2005 Legal Update

CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

2005
LEGAL UPDATE

TELECOURSE REFERENCE GUIDE

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INTRODUCTION

This telecourse reference guide addresses important case decisions and statutory law changes implemented during the legislative year. In an effort to expand this program to a statewide law enforcement audience, satellite transmission of the legislative update began in 1990. With the advances in technology, it is now distributed through other means. The program is intentionally designed to facilitate later use during roll call briefings.

The telecourse reference guide is designed to be used in conjunction with the training course. Materials are arranged to follow along the program sequence. Blank space has been provided to write notes, record information not included in the text, or to jot down questions.

Questions regarding this program should be directed to Jody Buna, Senior Law Enforcement Consultant, Training Program Services Bureau at the Commission on POST, (916) 227-4885

CHANGES IN

GENERAL LAW ENFORCEMENT

LAWS

CRIME: HIDDEN CAMERAS

Penal Code Section 647
Chapter 666 / Senate Bill 1484

SUMMARY: This law adds subsection 3 (A) to 647k P.C. It prohibits anyone from taking a hidden video or photograph of someone in a state of undress in an area where they had a reasonable expectation of privacy.

HIGHLIGHTS:

- Existing law makes it a misdemeanor for anyone to look through a hole or opening or to view, by means of any instrumentality, into the interior of any of specified rooms or any other interior place where the occupant has a reasonable expectation of privacy, with the intent to invade that privacy.
- This law would add bedrooms to the enumerated rooms to which this prohibition is applicable.
- Existing law also makes it a misdemeanor for a person to secretly videotape, film, photograph, or record by electronic means, another, identifiable person under or through his or her clothing, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which that other person has a reasonable expectation of privacy.
- Existing law provides that this and the above-described offense can be punished by imprisonment in a county jail not exceeding 6 months, by a fine not exceeding $1,000, or by both that fine and imprisonment, but authorizes a longer jail term of one year if the offense is committed after one or more prior convictions for these offenses or for the offense of peeking into an inhabited structure while loitering, wandering, or prowling upon private property.
- This law would make it a misdemeanor to use a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person.
- This new offense would be punished exactly as are the above-described offenses, except that the maximum fine would be $5,000 if the offense is committed after one or more prior convictions for the same offense, or for an offense referenced above.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is unlawful to produce a hidden video or photograph without the subjects consent.

NOTES:

SEX OFFENSES: HUMAN REMAINS SEXUAL CONTACT

Health and Safety Code Section 7052
Chapter 413 / Assembly Bill 1493

SUMMARY: This law makes sexually assaulting human remains a crime.

HIGHLIGHTS:

- Existing law provides that, with certain exceptions, every person who willfully mutilates, disinters, or removes from the place of interment any human remains, without authority of law, is guilty of a felony.
- This law would expand the scope of this felony to include any person who commits an act of sexual penetration on, or has sexual contact with, any remains known to be human.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Sexual assault on a corpse is now a crime.

NOTES:

SEX OFFENDERS: SEXUALLY VIOLENT OFFENDER RELEASES

Welfare and Institutions Code Section 6608.5 (Added)
Chapter 222 / Assembly Bill 493

SUMMARY: This law requires sexually violent predators be released to their county of domicile from the State Department of Mental Health when it's shown they no longer pose a threat to the public.

HIGHLIGHTS:

- Existing law provides for the commitment of convicted sexually violent predators to the custody of the State Department of Mental Health for treatment, under specified conditions. If the Director of Mental Health determines that the person's diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community, the director is required to forward a report and recommendation for conditional release to the superior court of the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the Department of Corrections and the court is required to set a hearing, as specified. A person who has been committed as a sexually violent predator may petition the court for conditional release with or without the recommendation or concurrence of the Director of Mental Health. Upon receipt of a petition from the Director of Mental Health or a committed person, if that petition is not based upon frivolous grounds, the court is required to hold a hearing to determine whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community; if not, the court is required to order the committed person placed with an appropriate forensic conditional release program operated by the state for one year.

- This law would require a nonparolee who is conditionally released under these provisions to be placed in the county of the domicile, as defined, unless the court finds that extraordinary circumstances, as defined, require placement outside the county of domicile.

- This law would require the department to consider concerns of the victim or the victim's next of kin. The bill would require the county of domicile to designate, and notify the department of, the county agency or program that will provide assistance and consultation in the process of locating and securing housing within the county for persons who are about to be conditionally released.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Sexually violent predators will be returning to their home Counties.

NOTES:

SEX OFFENDERS: SEXUALLY VIOLENT OFFENDER RELEASES

Welfare and Institutions Code Section 6609.1
Chapter 425 / Assembly Bill 2450

SUMMARY: This law requires notice to be given to law enforcement and the DA before sexually violent predators are returned to their home county.

HIGHLIGHTS:

- Existing law requires the State Department of Mental Health to notify local law enforcement officials when it makes a recommendation to the court for community outpatient treatment for any person committed as a sexually violent predator, or when it is aware that such a person has petitioned a court for release to the community.

- This law would, in addition, require notice to be given when the department or its designee makes a recommendation regarding a state-operated forensic conditional release program or proposes a placement location without making a recommendation, in the case of a subsequent placement or change of community placement, or when any other person proposes a placement location to the court and the department or its designee is made aware of the proposal.

- This law The bill would require the notice to include, among other things, the date, place, and time of the court hearing, would require notice be given also to the Department of Justice, would authorize the local agencies to provide written comment to the department and the court, would require the department to issue a written statement, and would require the court to consider those comments and statements.

- This law would permit a single agency in the community of the proposed placement to suggest alternate locations within that community.

- This law would delete the prohibition against notice being given after the release date.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement could voice an objection to the release of a sexually violent predator through the District Attorney.

NOTES:

SEX OFFENDERS: REGISTRATION

Penal Code Section 290
Chapter 761 / Assembly Bill 2395

SUMMARY: This law requires out of state sex offenders who were required to register in their previous state to register in California even when the crime, if committed in California, would not have required their registration.

HIGHLIGHTS:

- Existing law requires persons convicted of certain sex offenses in California to register as a sex offender, as specified.
- Existing law also requires persons convicted of certain sex offenses in other jurisdictions to register as a sex offender, as specified. Violations of certain of the registration requirements are crimes, as specified.
- This law would, subject to exceptions, require persons to register as a sex offender if the person has suffered a conviction in another state for a sex offense that would require the person to register as a sex offender in that state.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This expands the 290 registration requirements for out of state offenders.

NOTES:

SEX OFFENDERS: REGISTRATION

Penal Code Sections 290 & 290.4
Chapter 731 / Senate Bill 1289

SUMMARY: This law requires sex offenders to disclose every address where they live regardless for how long. They also must make a pre-moving written notification within five days and another notification within five days following the move.

HIGHLIGHTS:

- Existing law requires persons convicted of certain sex offenses to register with specified law enforcement agencies in the location in which the person resides or, if the person has no residence, where he or she is located, within 5 days of changing residence or location.
- Existing law provides that if the person who is registering has more than one residence address or location at which he or she regularly resides or is located, he or she shall register in each of the jurisdictions in which he or she regularly resides or is located.
- This law would provide that the registration requirement for multiple places applies regardless of the number of days or nights spent in each residence or location.
- Existing law provides that if any person who is required to register changes his or her residence address or location, the person shall inform, in writing within 5 working days, the law enforcement agency or agencies with which he or she last registered of the new address or location.
- This law would provide that if the person does not know the new residence address or location, the registrant shall inform the last registering agency or agencies that he or she is moving within 5 working days of the move, and shall later notify the agency or agencies of the new address or location within 5 working days of moving into the new residence address or location, whether temporary or permanent.
- Existing law provides that any person who is required to register who willfully violates any requirement of this section is guilty of a continuing offense.
- This law would provide that any person who is required to register under this section who willfully violates any requirement of this section is guilty of a continuing offense as to each requirement he or she violated.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: 290 registrants must register every address where they live as well as make written notification of any move within five days prior to and five days after. Each registration violation is a separate offense.

NOTES:

SEX OFFENDERS: REGISTRATION

Penal Code Section 290
Chapter 429 / Assembly Bill 2527

SUMMARY: This law redefines when transient 290 registrants must register.

HIGHLIGHTS:

- Existing law requires every person who has been convicted of any of a specified group of sexual offenses to register with local law enforcement agencies for the rest of his or her life while residing, or if he or she has no residence while located, attending school, or working, in California within 5 working days of coming into, or changing his or her residence or location within, California.
- Existing law requires a person who has no residence to update his or her registration no less than once every 60 days, as specified.
- Existing law also requires that, beginning on his or her first birthday following registration or change of address, the person is required to update his or her registration annually within 5 working days of his or her birthday.
- A California Court of Appeal decision, People v. North (2003) 112 Cal.App.4th 621, held that the terms ‘‘located’’ or ‘‘location’’ as used in these provisions are unconstitutionally vague.
- This law would recast these provisions with respect to persons who have no residence or who are living as transients in California.
- This law would also require a transient to register, and reregister, no less than once every 30 days, except as specified, regardless of the length of time he or she has been physically present in a particular jurisdiction, with the chief of police of a city, the sheriff of a county, or the chief of police of a campus, if he or she is physically present within their jurisdiction within a 30-day period, unless he or she was required to register at an earlier date because he or she reregistered on his or her birthday.
- This law would require a transient who moves out of state to inform the chief of police of the city or the sheriff of the county, as specified, within 5 working days of his or her move out of state.
- This law also requires the law enforcement agency to, within 3 days after receipt of the information, forward a copy of the change of location information to the Department of Justice. The department would be required to forward appropriate registration data to the law enforcement agency having local jurisdiction of the new place of residence or location.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Transient sex offenders must keep law enforcement informed of where they live.

NOTES:

SEX OFFENDERS: REGISTRATION

Penal Code Section 290.9 (Added)
Chapter 127 / Assembly Bill 1937

SUMMARY: This law adds requires law enforcement agencies to notify DOJ if they know a 290 registrant has not registered.

HIGHLIGHTS:

- Existing law requires a person convicted of any of certain specified sexual offenses to register with local law enforcement for the rest of his or her life while residing, located, attending school, or working in California, as specified.
- This law would require any state or local governmental agency, upon written request, to provide to the Department of Justice the address of any person represented by the department to be a person who is in violation of his or her duty to register under these provisions.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement agencies must notify DOJ of any unregistered sex offenders

NOTES:

SEX OFFENDERS: REGISTRATION

Penal Code Section 290.46 (Added)
Chapter 745 / Assembly Bill 488

SUMMARY: This law requires DOJ to establish a web site by July 1, 2005 which would give access to the Megan's Law information to anyone with an internet connection.

HIGHLIGHTS:

- Existing law requires the Department of Justice to continually compile specified information categorized by community of residence and ZIP Code regarding any person required to register as a sex offender for a conviction for the commission or attempted commission of any specified sex offense.
- Existing law requires the Department of Justice to operate a ''900'' telephone number for the public to inquire whether a named individual is among those specified registrants.
- Existing law also requires the department to provide a CD-ROM or other electronic medium containing a specified portion of the compiled sex offender information to certain law enforcement agencies. These law enforcement agencies are required to make the CD-ROM or other electronic medium available for public viewing, as specified.
- Existing law makes unauthorized use of the CD-ROM or "900" telephone number information a misdemeanor, and requires that reports be made by the department concerning the ''900'' telephone number program.
- This law would require the Department of Justice, on or before July 1, 2005, to make specified information about certain sex offenders available to the public via the Internet Web site and to update that information on an ongoing basis. This information would include all of the information currently available to the public via the CD-ROM, and would also include the home address of specified offenders. With regard to certain offenders whose residence addresses are to go on the Internet Web site only under specified circumstances relating to their criminal histories, the department would be required to put that address information on the Internet Web site on or before July 1, 2006.
- This law would also provide that certain offenders with less serious sexual offense histories, as specified, may apply to the Department of Justice for exclusion from the Internet Web site.
- This law would provide that such an individual would bear the burden of proving the facts that make him or her eligible for exclusion.
- This law would require the department to make a reasonable effort to provide notice to affected sex offenders that the department is required to make information about him or her available to the public via an Internet Web site and that he or she may be eligible for exclusion from the Internet Web site, as specified.
- The law would also (1) provide that any person who uses information disclosed pursuant to the

Internet Web site to commit a misdemeanor is punishable by a fine of not less than $10,000, nor more than $50,000, and that the use of that information to commit a felony is punishable by an additional 5-year term of imprisonment; (2) make it a misdemeanor for a sex offender who is required to register to enter the Internet Web site; (3) provide for civil liability for the misuse of sex offender information from the Internet Web site; and (4) require the Department of Justice to submit to the Legislature an annual report on the Internet Web site.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Megan's Law information will be available on the internet. Misusing the information in violation of the law is a misdemeanor. It is also unlawful for a sex offender to access the web site.

NOTES:

CRIME: ELDER ABUSE

Penal Code Section 368
Chapter 893 / Assembly Bill 3095

SUMMARY: This law changes the language from "had knowledge" to "reasonably should know" that someone is either an elder or dependant adult when prosecuting for elder abuse.

HIGHLIGHTS:

- Existing law proscribes crimes against elder and dependent adults involving physical and financial abuse.
- Existing law establishes criminal penalties for the willful abuse of an elder or dependent adult, when the person who permits or inflicts the abuse has knowledge that the victim is an elder or dependent adult.
- Existing law includes provisions relating to the award of attorney's fees and costs, and damages to a plaintiff, when it is proven by clear and convincing evidence that a defendant is liable for physical abuse, neglect, or financial abuse, and the defendant has also been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse.
- This law would revise these provisions to change the standard of proof for the commission of financial abuse to a preponderance of the evidence, but to permit additional recovery where there is clear and convincing evidence of recklessness, oppression, fraud, or malice.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law changes burden of proof from "had knowledge" to "reasonably should know" that someone is either an elder or dependant adult when charging someone with elder abuse.

NOTES:

DOMESTIC VIOLENCE: SUPPORT PERSON

Penal Code Section 679.05 (Added)
Chapter 159 / Senate Bill 1441

SUMMARY: This law allows a victim of domestic violence or abuse to have a domestic violence counselor and a support person present at any follow up formal interview after the initial statement taken by the reporting officer.

HIGHLIGHTS:

- Existing law provides that the victim of sexual assault or spousal rape has the right to have advocates present at any evidentiary, medical, or physical examination or interview by law enforcement authorities or defense attorneys, as specified.

- This law would provide that a victim of domestic violence or abuse has the right to have a domestic violence counselor and a support person of his or her choosing present at any interview by law enforcement authorities, district attorneys, or defense attorneys, as specified, and shall be notified orally or in writing by the attending law enforcement authority or district attorney of that right prior to the commencement of an initial interview.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement must inform a victim of domestic violence or abuse of their right to a counselor and support person.

NOTES:

DOMESTIC VIOLENCE: EVIDENCE

Evidence Code Section 1109
Chapter 116 / Assembly Bill 141

SUMMARY: Any previous incident of family abuse may be used in subsequent court cases against defendants charges with similar offenses.

HIGHLIGHTS:

- Under existing law, evidence of a person's character, such as opinion or specific instances of conduct, is generally not admissible to prove a defendant's conduct on a particular occasion, with specified exceptions.
- Existing law provides, however, that when a defendant is accused of domestic violence in a criminal action, evidence of the defendant's prior acts of domestic violence may be admitted to prove the defendant's conduct, except as to the findings and declarations of a regulatory agency or when the acts occurred more than 10 years ago or the court exercises its discretion to exclude the evidence of prior acts, as specified.
- This law would expand the definition of ''domestic violence'' for these purposes, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement needs to know that previous incidents of family violence may be used in court against defendants charged for other family violence offenses.

NOTES:

CRIME: IMPERSONATING A PEACE OFFICER

Penal Code Section 538e & 538 g (Added)
Chapter 22 / Assembly Bill 1153

SUMMARY: Wearing a uniform alone is enough to complete the crime of impersonating a peace officer. Other government representatives are added to the section as well.

HIGHLIGHTS:

- Existing law provides that any person, other than an officer or member of a fire department, who willfully wears, exhibits, or uses, among other things, the authorized badge, of an officer or member of a fire department or a deputy state fire marshal, with the intent of fraudulently personating an officer or member of a fire department or the Office of the State Fire Marshal, or of fraudulently inducing the belief that he or she is an officer or member of a fire department or the Office of the State Fire Marshal, is guilty of a misdemeanor.

- This law would revise the provisions to delete the reference to the badge, and instead, make the provisions applicable to a uniform.

- The law would also provide that use of the badge, or use of a badge that falsely purports to be authorized for that use, as specified, in the manner described, would be a misdemeanor.

- Existing law provides that a person who willfully makes or sells any badge which falsely purports to be authorized for the use of a peace officer, or which so resembles the authorized badge of a peace officer, as specified, is guilty of a misdemeanor.

- This law would provide that any person who willfully makes or sells any badge which falsely purports to be authorized for use as an authorized badge of, or which so resembles the authorized badge of, an officer or member of a fire department or deputy state fire marshal, as specified, is guilty of a misdemeanor punishable by a fine not exceeding $15,000.

- Existing law provides that any person, other than one who is a peace officer or an officer or member of a fire department, who willfully wears, exhibits, or uses a badge, insignia, emblem, certificate, card, or writing of a peace officer or of an officer or member of a fire department, with specified intent, or any person who does the same with respect to any badge, insignia, emblem, certificate, card, or writing which falsely purports to be authorized for the use of one who by law is given the authority of a peace officer or of an officer or member of a fire department, or which so resembles such an item, is guilty of a misdemeanor.

- This law would provide that any person, other than one who is a state, county, city, special district, or city and county officer or employee, who willfully wears or uses a badge, photographic identification card, or insignia of a state, county, city, special district, or city and county officer or employee, with specified intent, is guilty of a misdemeanor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: A uniform is enough of a symbol of a law enforcement officer or firefighter to complete the crime of impersonating a peace officer. Also, the mere use of an ID card to impersonate a government employee is also unlawful.

NOTES:

CRIME: 911 PHONE SYSTEM

Penal Code Section 653y (Added)
Chapter 295 / Assembly Bill 911

SUMMARY: This law makes it illegal to call 911 for anything other than a legitimate law enforcement or fire department problem.

HIGHLIGHTS:

- Existing law requires each local public agency to establish and have in operation within its jurisdiction a telephone service that automatically connects a person dialing the digits ''911'' to an established public safety answering point through normal telephone service facilities.

- This law would make the use of or knowingly allowing the use of the 911 telephone system for purposes other than for an emergency, as defined, an infraction, punishable by specified fines, with specified exceptions.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: There are now some consequences to using 911 for something other than an emergency call.

NOTES:

SEARCH WARRANTS: BUSINESS RECORDS

Penal Code Section 1536.5 (Added)
Chapter 372 / Assembly Bill 1894

SUMMARY: This law requires law enforcement agencies to provide copies of business records seized during search warrants.

HIGHLIGHTS:

- Existing law authorizes the seizure of business records by a governmental agency pursuant to a search warrant supported by probable cause to believe that the records constitute evidence of the commission of a crime. The court is authorized to order the seized property, including business records, returned upon a motion made on specified grounds, including the grounds that the property taken is not the same as that described in the warrant, the warrant was not supported by probable cause, the warrant or its execution violated state or federal constitutional standards, or the property has not been offered or will not be offered as evidence against the defendant.

- This law would provide a procedure for an entity whose business records have been seized by a government agency to demand that agency provide to it, within a 10 court day period, copies of the business records or access to the original records so that the entity can make copies of the records. The demand for the records would have to be supported by a declaration, under penalty of perjury, that denial of access to the records or copies of the records would either unduly interfere with the entity's ability to conduct its regular course of business or obstruct the entity from fulfilling an affirmative obligation that it has under the law. The government agency would be authorized to refuse to produce copies of the records or deny access to the records if a court determined, as provided, that this declaration was rebutted, or that possession of the records by the entity would pose a significant risk of ongoing criminal activity, or would impede or interrupt the investigation, or that other specified circumstances relating to the records applied.

- This law would specify procedures relating to requests for access to or copies of seized records, and relating to government agency refusals to copy or provide access to those records, including in camera hearings in specified circumstances.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement must provide a copy of some business records following the service of a search warrant.

NOTES:

PEACE OFFICERS: HEALTH BENEFITS

Government Code Section 22820
Chapter 440 / Assembly Bill 753

SUMMARY: This law gives health benefits to surviving spouses and children of fallen peace officers and firefighters and is retroactive to January one 2002.

HIGHLIGHTS:

- The Public Employees' Medical and Hospital Care Act provides continuing health benefits coverage to the surviving spouse of a firefighter or peace officer who dies as a result of an injury or disease sustained in the line of duty if the surviving spouse was married to the firefighter or peace officer at least one year prior to the date of death.
- This law would also make those benefits available to a surviving spouse if he or she was married to the firefighter or peace officer prior to the date that firefighter or peace officer sustained the injury or disease resulting in death.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Health benefits are extended to spouses and children of peace officers retroactive to January 2002.

NOTES:

PEACE OFFICERS: DEATH BENEFITS

Labor Code Section 4702
Chapter 92 / Assembly Bill 1840

SUMMARY: This law gives current death benefits to any officers that gave their lives in the line of duty with no dependents retroactive to January 1, 2003.

HIGHLIGHTS:

- Existing workers' compensation law generally requires employers to secure the payment of workers' compensation, including medical treatment, for injuries incurred by their employees that arise out of, or in the course of, employment. Existing law also provides for the payment of death benefits in the amount of $250,000 to the estate of a deceased employee who has no total dependents and no partial dependents for injuries occurring on or after January 1, 2004.

- This law would provide for the payment of death benefits in the amount of $250,000 to the estate of a deceased police officer who has no total dependents and no partial dependents for injuries occurring on or after January 1, 2003, but prior to January 1, 2004. It would also declare that it is the intent of the Legislature that this provision have retroactive effect.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Burbank Police Officer Matthew Pavelka's family will now be granted death benefits for his sacrifice.

NOTES:

PEACE OFFICERS: CIVIL RIGHTS TRAINING

Penal Code Sections 422.6, 422.76, 422.85, 422.88, 422.89, 422.9, 422.91, 422.93, 422.95, 594.3, 11410 & 11413, Civil Code Section 52.1

Chapter 700 / Senate Bill 1234

SUMMARY: This law makes numerous changes in law involving civil rights crime. This law also requires POST to develop training regarding those changes by July 2005.

HIGHLIGHTS:

- Existing law provides that no person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics.

- Existing law also provides that no person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics.

- This law would provide that conduct punishable under these provisions that also violates any other provision of law may be charged under all applicable provisions, but may only be punished once, as specified.
- Under existing law, the Commission on Peace Officer Standards and Training is required to establish and keep updated a continuing education classroom training course relating to law enforcement interaction with developmentally disabled and mentally ill persons. The course is required to contain core instruction in specified areas.

- This law would change the term ''developmentally disabled an mentally ill persons'' to ''mentally disabled persons.''

- This law would include in the course instruction by July 1, 2006, instruction on the fact that the crime was committed in whole or in part because of an actual or perceived disability of the victim is a hate crime.

- The law would require the commission, using available funding, to develop by July 1, 2005, a 2-hour telecourse to be made available to all law enforcement agencies in California on crimes against homeless persons and on how to deal effectively and humanely with homeless persons, including homeless persons with disabilities. The telecourse would be required to include

information on multi mission criminal extremism, as defined.

- Existing law requires the commission to develop guidelines and a course of instruction and training for law enforcement officers who are employed as peace officers, or who are not yet employed as a peace officer but are enrolled in a training academy for law enforcement officers, addressing hate crimes.

- Existing law requires the course to include instruction in specified areas.

- This law would, in addition, by July 1, 2007, require the course to have instruction in multi mission criminal extremism, the special problems inherent in some categories of hate crimes, preparation for, and response to, possible future anti-Arab/Middle Eastern and anti-Islamic hate crime waves, and any other future hate crime waves that the Attorney General determines are likely.

- This law would require that the commission include in the guidelines a framework and possible content of general order or other formal policy on hate crimes that all state law enforcement agencies shall adopt and local law enforcement agencies would be encouraged to adopt, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: POST will develop training regarding civil rights changes by July 2005.

NOTES:

CRIME: HATE CRIME VANDALISM

Penal Code Section 422.7
Chapter 780 / Assembly Bill 2288

SUMMARY: This law changes the dollar amount from $500 to $400 making it the same as regular vandalism.

HIGHLIGHTS:

- Under existing law certain hate crimes are punishable by imprisonment in the state prison or in a county jail not to exceed one year, by a fine not to exceed $10,000, or by both, if the crime is committed (1) against the person or property of another to intimidate or interfere with that other person's free exercise or enjoyment of any legal or constitutional right, and (2) because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because the defendant perceives that the other person has one or more of those characteristics, and (3) under specified circumstances, including, among other things, that the crime against property causes damage in excess of $500.
- This law would lower the property damage amount to $400.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The dollar amount for hate crime vandalism is reduced from $500 to $400.

NOTES:

CRIME: CARGO THEFT

Penal Code Section 487h (Added)
Chapter 515 / Assembly Bill 1814

SUMMARY: This law makes it unlawful to take any goods, wares, products, or manufactured merchandise that has been loaded into a trailer, railcar, or cargo container, awaiting or in transit with a value over $400.

HIGHLIGHTS:

- Existing law provides that every person who steals, takes, or carries away specified moneys, labor, or real or personal property is guilty of grand theft
- This law would, in addition, generally provide, until January 1, 2010, that every person who steals, takes, or carries away cargo of another, as defined, when the cargo taken is of a value exceeding $400, is guilty of grand theft.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Grand theft cargo is a separate crime.

NOTES:

CRIME: HYPODERMIC NEEDLES

Business & Professions Code Sections 4145 & 4147
Health & Safety Code Section 11364
Chapter 608 / Senate Bill 1159

SUMMARY: This law allows certain pharmacists to furnish up to 10 hypodermic needles or syringes to anyone 18 years of age or older. It also allows the legal possession of up to 10 syringes or needles without a prescription if it's acquired through an authorized source. It is also illegal to discard or dispose of a hypodermic needle or syringe upon the grounds of a playground, beach, park, or any public or private elementary, vocational, junior high, or high school.

HIGHLIGHTS:

- Existing law regulates the sale, possession, and disposal of hypodermic needles and syringes. Under existing law, a prescription is required to purchase a hypodermic needle or syringe for human use, except to administer adrenaline or insulin.

- This law would. subject to authorization by a county or city, would authorize a licensed pharmacist, until December 31, 2010, to sell or furnish 10 or fewer hypodermic needles or syringes to a person for human use without a prescription if the pharmacy is registered with a local health department in the Disease Prevention Demonstration Project, which would be created by the bill to evaluate the long-term desirability of allowing licensed pharmacies to sell or furnish nonprescription hypodermic needles or syringes to prevent the spread of blood-borne pathogens, including HIV and hepatitis C.

- The law would require a pharmacy that participates in the Disease and Demonstration Project pursuant to county or city authorization to comply with specified requirements, including registering with the local health department.

- The law would require the State Department of Health Services, in conjunction with an advisory panel, to evaluate the effects of allowing the sale of hypodermic needles or syringes without prescription, and would require a report to be submitted to the Governor and the Legislature by January 15, 2010.

- Alternatively, the bill would also authorize the sale or furnishing of hypodermic needles or syringes to a person for human use without a prescription if the person is known to the furnisher and has previously provided the furnisher with a prescription or other proof of a legitimate medical need.

- The law would make it unlawful to discard or dispose of a hypodermic needle or syringe upon the grounds of a playground, beach, park, or any public or private elementary, vocational, junior high, or high school.

- Existing law requires a pharmacist to keep detailed records of nonprescription sales of hypodermic needles and syringes.

- This law would delete that requirement.

- Existing law prohibits the possession and sale of drug paraphernalia.

- This law, until December 31, 2010, subject to authorization by a county or city, would allow a person to possess 10 or fewer hypodermic needles or syringes if acquired through an authorized source.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is no longer unlawful to possess a 10 or fewer hypodermic needles or syringes. Discarding hypodermic needles or syringes upon the grounds of a playground, beach, park, or any public or private elementary, vocational, junior high, or high school is now illegal.

NOTES:

ALCOHOL BEVERAGE CONTROL: FURNISHING MINORS

Business & Professions Code Section 25658
Chapter 291 / Assembly Bill 2037

SUMMARY: This law makes it unlawful to merely furnish alcohol to a minor who then is involved in an auto accident and kills or injures someone.

HIGHLIGHTS:

- The Alcoholic Beverage Control Act makes it a misdemeanor for any person under the age of 21 years to purchase any alcoholic beverage or consume any alcoholic beverage in any on-sale premises. The act also makes it a misdemeanor for any person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverages to any person under the age of 21

- Existing law provides that any person who violates that provision by purchasing an alcoholic beverage for a person under the age of 21, and the person under the age of 21 thereafter consumes the alcohol and proximately causes great bodily injury or death, as specified, is guilty of a misdemeanor, and shall be punished by imprisonment, a fine not exceeding one thousand dollars ($1,000), or both.

- This law would expand that provision to include any person who furnishes, gives, or gives away any alcoholic beverage to a person under the age of 21 years, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Anyone who now furnishes alcohol to a minor that results in great bodily injury or death is guilty of a misdemeanor.

NOTES:

CRIME: INTERNET PIRACY

Penal Code Section 653aa (Added)
Chapter 617 / Assembly Bill 1506

SUMMARY: This law makes it unlawful for anyone to send a movie or a song over the internet and hide their e-mail address. The law also specifies that it has to be sent to at least 10 people.

HIGHLIGHTS:

- Existing federal law, through copyright, provides authors of original works of authorship, as defined, with certain rights and protections.
- Existing federal law generally gives the owner of the copyright the right to reproduce the work in copies or phono records and the right to distribute copies or phono records of the work to the public.
- Existing federal law limits the liability of an Internet service provider for copyright infringement for transmitting material under specified conditions.
- Existing law also provides for the forfeiture and destruction of articles upon which sounds or images can be stored, and electronic and other devices used in reproducing those articles, in connection with a violation of provisions prohibiting misappropriation of recorded music, sounds of a live performance, or an audiovisual works, as specified.
- This law would provide that it is a misdemeanor for a person, who is located in California, who knows that a particular recording or audiovisual work is commercial, to knowingly electronically disseminate all or substantially all of that commercial recording or audiovisual work to more than 10 other people without disclosing his or her e-mail address, and the title of the recording or audiovisual work.
- This law would provide that a minor who violates these provisions is punishable by a fine not exceeding $250 for a first or 2nd offense and by a fine not exceeding $1,000, imprisonment in a county jail, or by both that fine and imprisonment for a 3rd or subsequent violation.
- This law would define electronic dissemination as initiating a transmission of, making available, or otherwise offering a commercial recording or audiovisual work for distribution on the Internet or other digital network, as specified. This bill would provide that these provisions would not apply to a person who electronically disseminates a commercial recording to his or her immediate family or within his or her personal network, as defined, to a situation in which the copyright owner has explicitly given permission for or licensed the recording or audiovisual work to be freely disseminated, electronically disseminated, or disseminated by means of a cable television service.
- This law would also provide that an Internet service provider does not violate or aid and abet a violation of these provisions, as specified.
- This law would also provide that a court shall order the deletion or destruction of any electronic file

containing a commercial recording or audiovisual work, the dissemination of which was the basis of the violation.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is unlawful to distribute copies of copyrighted audio or audiovisual work to at least ten other people without disclosing the originators e-mail address.

NOTES:

CRIME: COMPUTER SPYWARE

Business & Professions Code Sections 22947, 22947.1, 22947.2, 22947.3, 22947.4, 22947.5 & 22947.6 (Added)
Chapter 843 / Assembly Bill 1436

SUMMARY: This law adds the Consumer Protection Against Computer Spyware Act to the Business and Professions Code making it illegal to alter the contents of someone's computer, as defined.

HIGHLIGHTS:

- Existing law provides for the regulation of various businesses by the Department of Consumer Affairs. No existing law provides for the regulation of computer spyware.
- This law would prohibit a person or entity other than the authorized user of a computer owned by a person in California from, with actual knowledge, conscious avoidance of actual knowledge, or willfully, causing computer software to be copied onto the computer and using the software to (1) take control of the computer, as specified, (2) modify certain settings relating to the computer's access to or use of the Internet, as specified, (3) collect, through intentionally deceptive means, personally identifiable information, as defined, (4) prevent, without authorization, an authorized user's reasonable efforts to block the installation of or disable software, as specified, (5) intentionally misrepresent that the software will be uninstalled or disabled by an authorized user's action, or (6) through intentionally deceptive means, remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer.
- The law would also prohibit a person or entity who is not an authorized user from inducing an authorized user to install a software component by intentionally misrepresenting that it is necessary for security or privacy or in order to open, view, or play a particular type of content.
- The law would prohibit a person or entity who is not an authorized user from deceptively causing the copying and execution on the computer of software components with the intent of causing an authorized user to use the components in a way that violates any of these prohibitions.
- The law would provide that if any part of these provisions or their applications are held invalid, the invalidity would not affect other provisions.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful for a person or company to deceptively install spyware on a computer.

NOTES:

CRIME: FORCE FEEDING BIRDS

Health & Safety Code Section 25980
Chapter 904 / Senate Bill 1520

SUMMARY: This law makes the practice of force feeding the birds in order to enlarge their livers illegal effective 2012.

HIGHLIGHTS:

- Existing law authorizes an officer to issue a citation to a person or entity keeping horses or other equine animals for hire if the person or entity fails to meet standards of humane treatment regarding the keeping of horses or other equine animals.
- This law would establish similar provisions regarding force feeding a bird, as defined. The bill would prohibit a person from force feeding a bird for the purpose of enlarging the bird's liver beyond normal size, and would prohibit a person from hiring another person to do so.
- The law would also prohibit a product from being sold in the state if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size. The bill would authorize an officer to issue a citation for a violation of those provisions in an amount up to $1,000 per violation per day.
- The law would provide that these prohibitions shall become operative on July 1, 2012. Until July 1, 2012, this bill would prohibit an existing or future civil or criminal cause of action for engaging in an act prohibited by the bill, from proceeding against a person or entity engaged in, or controlled by persons or entities who were engaged in, agricultural practices that involved force feeding birds at the time of the enactment of this bill.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: On July 1, 2012, it will be unlawful to force feed birds for the purpose of enlarging the bird's liver.

NOTES:

CRIME: THREATS AGAINST STAFF FAMILIES OF PUBLIC OFFICIALS

Penal Code Section 76
Chapter 512 / Assembly Bill 1433

SUMMARY: This law makes it a wobbler to threaten staff members of elected public officials families. The threat has to be related to the staff member's official duties and you have to show that the person who is making the threat, has the apparent ability to carry out the threat.

HIGHLIGHTS:

- Under existing law, every person who knowingly and willingly threatens the life of, or threatens serious bodily harm to, any elected public official, county public defender, county clerk, exempt appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison Terms, or the staff or immediate family, as defined, of any of these persons, with the specific intent that the statement is to be taken as a threat, and the apparent ability to carry out that threat by any means, is guilty of a public offense.

- This law would include the immediate family of the staff of the specified persons within the protections afforded by these provisions.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful to threaten the family of a staff member of elected public officials.

NOTES:

BAIL BONDS: SOLICITATION

Penal Code Section 160 (Added)
Chapter 165 / Assembly Bill 1694

SUMMARY: This law makes it unlawful for bail bond companies to pay inmates to solicit business for them.

HIGHLIGHTS:

- Existing law generally regulates persons offering bail services as bail licensees. Violation of the provisions regulating solicitation of bail is a crime.

- This law would provide that no bail licensee may employ, engage, solicit, pay or promise any payment, compensation, consideration or thing of value to any person incarcerated in any prison, jail, or other place of detention for the purpose of that person soliciting bail on behalf of the licensee. Violation of these prohibitions would be a misdemeanor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful for an inmate to solicit for a bail bond company.

NOTES:

STATE OF EMERGENCY: RATE INCREASES

Business & Professions Code Section 17568.5 (Added) Penal Code Section 396 Chapter 492 / Senate Bill 1363

SUMMARY: This law makes it unlawful for a hotel or motel operator from raising their rates more than 10% within 30 days of a declared emergency. This provision currently applies to other commercial businesses.

HIGHLIGHTS:

- Existing law regulates advertising, including motel and motor court rate signs.
- Existing law, upon the proclamation of a state of emergency or a declaration of a local emergency, and for a certain period following the proclamation or declaration, makes it a misdemeanor for a person, contractor, business, or other entity to sell or offer to sell certain goods and services for a price that exceeds by 10% the price charged by that person immediately prior to the proclamation of emergency, except as specified. Existing law allows for the extension of these prohibitions for additional 30-day periods under specified circumstances, and makes a violation an unfair business practice and an act of unfair competition.
- This law would also prohibit the owner or operator of a hotel or motel from increasing its regular advertised rates by more than 10% for 30 days following a proclamation or declaration of emergency, except as specified.
- The law would make a violation of this prohibition a misdemeanor, and would make a violation an unfair business practice and an act of unfair competition.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Hotel and motel operators may not increase rates more than 10% following a declared emergency.

NOTES:

CRIME: TEAK SURFING

Harbors & Navigation Code Sections 690, 681, 682, 683, 684 & 685
Chapter 565 / Assembly Bill 2222

SUMMARY: This law makes it unlawful for a vessel to run idle while someone is teak surfing, platform dragging, or body surfing behind it.

HIGHLIGHTS:

- The Department of Boating and Waterways regulates the operation of vessels on inland and coastal waters of California.
- Existing law makes all money in the Harbors and Watercraft Revolving Fund available, to pay appropriations for, among other things, boating safety.
- This law would enact the Anthony Farr and Stacy Beckett Boating Safety Act of 2004. The act would make it unlawful to operate a motorized vessel, or have the engine of a motorized vessel run idle, while someone is teak surfing, platform dragging, or bodysurfing behind the motorized vessel, or while someone is occupying or holding onto the swim platform, swim deck, swim step, or swim ladder of the motorized vessel, as specified.
- The act would specify certain requirements for state-sponsored boating safety courses, require any new or used motorized vessel, when sold, to bear warning stickers as to the danger of carbon monoxide poisoning and boats, and require that certain informational materials distributed by the Department of Motor Vehicles with respect to renewals for boat registrations contain similar information about the dangers of carbon monoxide poisoning and boats. The bill would make these latter 2 requirements regarding warning stickers and informational materials operative on May 1, 2005.
- The law would permit the Department of Boating and Waterways to use funds in the Harbors and Watercraft Revolving Fund appropriated to the department to administer this act and to reimburse the Department of Motor Vehicles for its costs to administer this act.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful to hold on to the swim step of a boat while it is running.

NOTES:

CHANGES IN

FIREARMS

LAWS

FIREARMS: .50 CALIBER BMG RIFLES

Penal Code Sections 245, 12011, 12022, 12022.5, 12275,12275.5, 12280, 12285, 12286, 12287, 12288, 12288.5, 12289, 12290 and 12278 (Added)
Chapter 494 / Assembly Bill 50

SUMMARY: .Defines a center-fire rifle that fires a .50 caliber BMG cartridge as an assault weapon. Allows for the sale of .50 caliber BMG rifles on or before December 31, 2004, and delivery of the rifle up to 30 days from the Dealer Record of Sale (DROS). All .50 caliber BMG assault rifles must be registered by April 30, 2006, with the Department of Justice (DOJ). Possession of an unregistered assault rifle is a misdemeanor and manufacturing, distribution, sales, keeping or offering for sale, importation, giving, lending are felonies without proper permits issued by DOJ. Handguns of .50 caliber, .50 caliber ammunition, federally defined antiques, curios, and relics are not included in this law. Previously registered assault weapons that have an interchangeable .50 caliber barrel do not need to be registered again.

HIGHLIGHTS:

- Existing law makes it an offense for any person to commit an assault upon the person of another with a machinegun or an assault weapon.
- Existing law also makes it an offense for any person to commit an assault upon the person of a peace officer or firefighter, as specified, with a machinegun or assault weapon.
- This law would expand each of these offenses to include an assault with a .50 BMG rifle, as defined.
- Existing law establishes the Prohibited Armed Persons File database that tracks possession or ownership of firearms and assault weapons, as specified.
- This law would include tracking the possession and ownership of .50 BMG rifles in the database, as specified.
- Existing law defines ‘‘assault weapon’’ for purposes of regulation.
- This law would define ‘‘.50 BMG rifle’’ and ‘‘.50 BMG cartridge’’ for purposes of regulation.
- Existing law makes it an offense, subject to certain exceptions, for any person to manufacture or cause to be manufactured, import into this state, transport, distribute, keep for sale, offer or expose for sale, give, lend, or possess an assault weapon, as specified, and provides a sentence enhancement for anyone who transfers, lends, sells, or gives an assault weapon to a minor, as specified.
- This law would extend those provisions to include a .50 BMG rifle.
- Existing law provides a scheme for registration and issuance of permits in connection with assault weapons.
- This law would establish similar provisions for the registration and issuance of permits in

connection with .50 BMG rifles.

- This law would authorize the Department of Justice to charge a registration fee not exceeding $25 for the registration of a .50 BMG rifle, as specified.

- Existing law forbids the broadcast over police radio of information that an individual has registered, or has a permit to possess, an assault weapon, with specified exceptions.

- This law would expand those provisions to cover individuals who register or have permits to possess .50 BMG rifles.

- Existing law provides that persons may arrange to relinquish an assault weapon to a police or sheriff's department.

- This law would similarly permit persons to arrange to relinquish a .50 BMG rifle to a police or sheriff's department.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Now, .50 caliber BMG rifles are defined as assault weapons, and they must be registered with the DOJ by April 30, 2006. They may no longer be sold to the public after December 31, 2004.

NOTES:

FIREARMS: POSSESSION AND TRANSFER

Penal Code Sections 12028, 12028.5, 12028.7, 12030, 12084 & 12021.3 (Added)
Welfare and Institutions Code Section 8107 (Repealed)
Chapter 602 / Assembly Bill 2431

SUMMARY: This bill requires a person to submit a firearm clearance application to DOJ prior to return of the firearm by an agency or the court. Fees will be charged by DOJ to complete the eligibility check, and additional fees may be charged by local authorities for administrative/storage costs. The DOJ fees will be waived if the firearm was reported stolen prior to being recovered by a law enforcement agency. If the owner is prohibited from possessing firearms and the firearm is not illegal, the owner may sell/transfer the firearm via the law enforcement agency to a licensed firearms dealer. After clearance is received, law enforcement retains the firearm up to 180 days after which unclaimed firearms may be disposed of pursuant to 12028 P.C. The status of the firearm from receipt by the agency to final disposition is required by law to be entered in the DOJ Automated Firearms System (AFS)

HIGHLIGHTS:

- Existing law generally regulates the possession and transfer of firearms.
- This law would add requirements to the procedure for persons to obtain or dispose of their firearms that are in the custody of a law enforcement agency or court.
- The law would require the person to make application to the Department of Justice for a determination that the person is eligible to possess a firearm.
- The law would provide that knowingly omitting required information or furnishing fictitious information in connection with the application would be a misdemeanor.
- The law would require law enforcement agencies to determine if a firearm to be returned is stolen.
- The law would prohibit release of a firearm to an applicant by a law enforcement agency or court entity unless certain criteria are met.
- The law would require certain information regarding the applicant and certain firearms be maintained by the Department of Justice in the Automated Firearms System, as specified.
- The law would authorize the Department of Justice to charge a fee of $20 for firearms eligibility processing, and a fee of $3 for each additional handgun that is processed, as specified. It would authorize a local government to adopt a regulation, ordinance, or resolution setting fees to cover the costs of the seizure, storage, and return of a firearm to a licensed dealer or owner, as specified.
- The bill would make other conforming changes.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill means that no court or law enforcement

agency may release a firearm to the owner until a DOJ firearm clearance has been obtained. If the firearm owner is found to be prohibited from firearms possession, the owner via the law enforcement agency may sell/transfer the firearm to a licensed firearms dealer. The law enforcement agency may charge administrative/storage fees to the firearm owner, and unclaimed firearms may be disposed of by law after 180 days. The law enforcement agency must enter information about the firearm into AFS from the time acquired to the final disposition.

NOTES:

FIREARMS: ENFORCEMENT OF FIREARM OWNERSHIP RESTRICTIONS / INCREASE IN TIME FIREARMS MAY REMAIN IN CUSTODY OF LAW ENFORCEMENT

Penal Code Sections 12021, 12028.7
Chapter 830 / Assembly Bill 2695

SUMMARY: Requires the DOJ, subject to available funding, to work with the State Judicial Council, the California Alliance Against Domestic Violence, prosecutors, and law enforcement, probation, and parole officers to develop a protocol designed to facilitate the enforcement of restrictions on firearm ownership. Except where a procedure is already provided by existing law, requires a receipt issued when firearms are taken into custody by a law enforcement officer to include a time limit for recovery. Increases the time that an agency may hold such firearms from 48 hours to five business days when no action is taken by the agency regarding those firearms.

HIGHLIGHTS:

- The protocol is required to be completed on or before January 1, 2005.
- Protocol will include notice to defendants who are restricted of the procedures by which they shall dispose of firearms when required to do so, explain how defendants shall provide proof of the lawful disposition of firearms, and explain how defendants may obtain possession of seized firearms when legally permitted to do so.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement will be asked to participate in the development of the protocol. Requires a receipt issued when firearms are taken into custody by a law enforcement officer to include a time limit for recovery. Increases the time that an agency may hold such firearms from 48 hours to five business days when no action is taken by the agency regarding those firearms.

NOTES:

FIREARMS: IMITATION

Government Code Section 53071.5
Penal Code Sections 417.4 (Amended), 12550, 12553, 12554, 12555, and 12556 (Added), and 417.2 (Repealed)
Chapter 607 / Senate Bill 1858

SUMMARY: This bill increases restrictions on imitation firearms and expands the definition to include air-soft type and other non-metallic BB devices to the definition of imitation firearms. Packaging advisories warning consumers about the dangers of imitation firearms are required of manufacturers. Altering an imitation firearm to make it look like a real firearm is a misdemeanor while openly displaying it in public is an infraction for the first two offenses and a misdemeanor for subsequent offenses. It is a misdemeanor to exhibit an imitation firearm in a threatening manner.

HIGHLIGHTS:

- Existing law defines ''imitation firearm'' which definition excludes BB guns.
- This law would include a BB device within the definition of ''imitation firearm'' for certain purposes.
- Existing law generally regulates commerce in imitation firearms, as specified.
- This law would repeal, recast and add those provisions, and expand certain exceptions to the scope of those provisions regulating commerce of imitation firearms.
- Existing law, subject to exceptions, makes it an offense to draw or exhibit an imitation firearm in a threatening manner, as specified.
- This law would expand the definition of imitation firearm for purposes of that crime.
- This law would provide that, subject to exceptions, any person who alters a device that is not an imitation firearm with the result that the device appears more like a firearm, as specified, is punishable as a misdemeanor.
- This law would provide that any manufacturer, importer, or distributor of imitation firearms that fails to comply with any applicable federal law or regulation governing the marking of a toy, look-alike or imitation firearm as defined by federal law or regulation is punishable as a misdemeanor. By creating a new crime, this bill would impose a state-mandated local program.
- This law would require an advisory label for imitation firearms, as specified. The bill would provide that failure to provide the advisory would make a manufacturer, importer, or distributor liable for a civil fine, as specified.
- This law would, subject to exceptions, make it an offense to openly display or expose any imitation firearm in a public place.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill now makes it a crime to alter an imitation firearm to look like a real firearm. It also makes it a crime to display the imitation firearm in public or draw/exhibit it in a threatening manner.

NOTES:

2005 LEGAL UPDATE

FIREARMS: LAW ENFORCEMENT OFFICERS SAFETY ACT OF 2004

Chapter 44 Title 18 U. S. Code Sections 926B & 926C (Added)
United States House of Representatives Bill 218

SUMMARY: This federal law allows active and honorably retired law enforcement officers to carry concealed firearms anywhere in the United States. It does not affect current laws and regulations regarding carrying a firearm aboard aircraft. There are many unanswered questions and concerns about this federal law, and the DOJ firearms Division has assembled a task force to sort out the issues involving this legislation. In the meantime, officers are cautioned about carrying concealed weapons outside of California while out-of-state officers are cautioned about carrying concealed weapons into California.

HIGHLIGHTS:

- Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

- (b)This section shall not be construed to supersede or limit the laws of any State that--
  (1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
  (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

- ©)As used in this section, the term qualified law enforcement officer' means an employee of a governmental agency who--
  (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;
  (2) is authorized by the agency to carry a firearm;
  (3) is not the subject of any disciplinary action by the agency;
  (4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;
  (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
  (6) is not prohibited by Federal law from receiving a firearm.

- (d)The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer.

- As used in this section, the term `firearm' does not include--
  (1) any machinegun (as defined in section 5845 of the National Firearms Act);
  (2) any firearm silencer (as defined in section 921 of this title); and
  (3) any destructive device (as defined in section 921 of this title).'.

- Notwithstanding any other provision of the law of any State or any political subdivision thereof, an

individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

- (b) This section shall not be construed to supersede or limit the laws of any State that--
  (1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or
  (2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

- ©) As used in this section, the term `qualified retired law enforcement officer' means an individual who--
  (1) retired in good standing from service with a public agency as a law enforcement officer, other than for reasons of mental instability;
  (2) before such retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest;
  (3)(A) before such retirement, was regularly employed as a law enforcement officer for an aggregate of 15 years or more; or
    (B) retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;
  (4) has a nonforfeitable right to benefits under the retirement plan of the agency;
  (5) during the most recent 12-month period, has met, at the expense of the individual, the State's standards for training and qualification for active law enforcement officers to carry firearms;
  (6) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
  (7) is not prohibited by Federal law from receiving a firearm.

- (d) The identification required by this subsection is--
  (1) a photographic identification issued by the agency from which the individual retired from service as a law enforcement officer that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm; or
  (2)(A) a photographic identification issued by the agency from which the individual retired from service as a law enforcement officer; and
    (B) a certification issued by the State in which the individual resides that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State to meet the standards established by the State for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: On the surface, this law seems to allow active and honorably retired officers to carry concealed firearms anywhere in the United States. There are, however, many issues and concerns about implementing the law. A DOJ task force has been established to help sort out the problem areas. The various issues are available for review by logging on the DOJ Firearms Division website and reading the frequently asked questions: www.ag.ca.gov

The general information line at the Firearms Division is: 916-263-4887.

NOTES:

CHANGES IN

TRAFFIC

LAWS

VEHICLES: CHILD PASSENGER RESTRAINT SYSTEM

Vehicle Code Section 27360
Chapter 524 / Assembly Bill 1697

SUMMARY: Requires all children under the age of six who weigh less than 60 pounds to be secured in a child passenger restraint system located in the rear seat, unless specified circumstances are present.

HIGHLIGHTS:

- Requires that a child or ward required to be secured in a child safety seat to be secured in such seat in the rear seat of the vehicle.

  An exemption to this requirement would be granted if:
  - -there is no rear seat;
  - -the rear seats are side-facing jump seats;
  - -the rear seats are rear-facing seats;
  - -the restraint system cannot be installed properly in the rear seat;
  - -all rear seats are already occupied by children under the age of 12 years, or;
  - -medical reasons necessitate that the child not ride in the rear seat.

- A child or ward may not ride in the front seat of a motor vehicle with an active passenger air bag if they are under one year of age, weigh less than 20 pounds, or are riding in a rear-facing child passenger restraint system.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT:

According to a 1999 study produced by the Insurance Institute of Highway Safety (IIHS), children, 12 years or younger, who ride in the back seat suffered one third fewer fatalities than those in the front seat. Such studies compelled the National Highway Traffic Safety Administration (NHTSA) to recommend placing all non-teenaged children in the rear seat. NHTSA concedes, however, that if the only option is to seat the child in the front, several steps should be taken to avoid injuries from impact, particularly the deployment of an air bag. Those steps include restraining the child in a safety seat (already required for certain children) and making sure the seat is pushed all the way back to maximize the distance between the child and the air bag. While NHTSA states that simply scooting the seat back could prevent injury, exactly how far back to be considered safe is subjective and depends largely on the vehicle type and the power of the bag. To avoid a possible misjudgment, NHTSA believes placing children in the rear seat should be the standard.

According to information provided by the California Association of Public Hospitals and Health Systems (CAPH), motor vehicle collisions remain one of the leading causes of child mortality in California despite progressive legislative and public education efforts. To prevent such deaths, they also believe that the safest place for children to ride in a vehicle is in the back seat while properly restrained.

Additionally, this bill was recently amended in the Senate to prohibit children from riding in the front seat with an active passenger air bag if the child is; 1) under the age of one; 2) weighs less than 20 pounds; or, 3) is riding in a rear-facing child passenger restraint system. The prescribed exemptions in the bill would

not be accepted in these cases. According to the author, the reason this provision is important is that "anyone who reads the exemptions could easily come to the conclusion that it is legal (and reasonably safe) to put an infant in front of an air bag if the car seat is too big for the back seat or if the baby is sick." The author contends that "air bags kill rear-facing babies who are otherwise properly secured because the air bag could explode at 200 mph right next to the babies head." This latest amendment seeks to prevent such tragedies.

In response to the information provided by NHTSA, IIHS, and other sources, the author introduced this bill to ensure that children, who are under the age of six and weigh less than 60 pounds, are placed in the rear seat.

NOTES:

VEHICLES: MOTORIZED SCOOTERS

Vehicle Code Sections 407.5, 12804.9 VC and 21226 VC (Added)
Chapter 755 / Assembly Bill 1878

SUMMARY: This law would require manufacturers of motorized scooters to provide a specified disclosure advising buyers it is illegal to modify or alter the exhaust system for the purposes of sound amplification, or cause it to fail to meet applicable emission requirements. This law would prohibit a person from operating a motorized scooter on a highway or off-highway, other than an electric scooter, unless the motorized scooter has a muffler in constant operation that is properly maintained. This law would also restrict the usage of motorized scooters to those who possess a valid Class C driver's license or instruction permit. Furthermore, this law would authorize cities and counties to adopt ordinances regulating the operation of motorized scooters on local highways, if those regulations do not conflict with the Vehicle Code (VC).

HIGHLIGHTS:

- This law would require manufacturers of motorized scooters to provide a disclosure advising buyers it is illegal to modify the exhaust system of such a device that creates excessive noise pursuant to 27150, 27150.3, and 27151 VC. This bill would further require the disclosure to be printed in not less than 14 point boldface type, on a single piece of paper containing no information other than the disclosure.

- This law would amend Section 407.5 of the Vehicle Code (VC) by clarifying that a motorized scooter is any two wheeled device that has handlebars, has a floorboard designed to be stood upon when riding, and is powered by an electric motor. The device may also include a seat that does not interfere with the ability of the rider to stand and ride, and may also be designed for human propulsion. This bill would also prohibit a motorized scooter customer from causing a motorized scooter to fail to meet applicable emission requirements, and excludes motorcycles, motor driven cycles, motorized bicycles, and mopeds from the definition of motorized scooter.

- This law would prohibit a person from operating a motorized scooter unless he/she possesses a valid Class C driver's license or instruction permit.

- This law would authorize a city or county to adopt an ordinance regulating the operation of motorized scooters on local highways, and deletes the authority to adopt an ordinance regulating the registration of these vehicles.

- This law would add Section 21226 VC providing that a person shall not sell or offer for sale a motorized scooter that produces a maximum noise level exceeding 80 db at a distance of 50 feet from the centerline of travel when tested in accordance with Society of Automotive Engineers (SAE) Recommended Practice J331 JAN00. This bill would also require that a motorized scooter, that is operated on or off-highway shall be equipped with a muffler meeting the requirements of this section, in constant operation and properly maintained to prevent any excessive or unusual noise, and would prohibit a muffler or exhaust system from being equipped with a cutout, bypass, or similar device. This bill would provide that a person shall not modify the exhaust system of a motorized scooter in a manner that will amplify or increase the noise level emitted by the motor of the scooter so that it is not in compliance with this section, or exceeds the noise level limit established by the provisions of this bill, and that a person shall not operate a motorized scooter with an exhaust system so modified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT:

Recent reports of tragedy involving injuries to young people, including the death of a 12 year old boy in Vallejo, Ca., who were operating motorized scooters, have prompted a public outcry to apply additional safety regulations on these potentially dangerous devices. Furthermore, there have been complaints of excessive noise, specifically in the Oakland area, caused by motorized scooters with modified exhaust systems.

On February 7, 2004, Gerardo Hollis, a 12 year old boy from Vallejo, was killed while riding a motorized scooter. Gerardo was riding a borrowed scooter and wearing a bicycle helmet when his hand brake failed, which resulted in a fatal collision with a 1 ton pick-up truck. This tragic event occurred three days after the introduction of this bill.

According to the U.S. Consumer Product Safety Commission (CPSC), in 2000 there were an estimated 4,390 hospital emergency room treated injuries associated with motorized scooters. This represents more than a 200-percent increase over the 1999 estimate of 1,330 injuries. CPSC recommended that riders wear the same safety gear as recommended for non-powered scooters - a helmet, knee and elbow pads, and sturdy shoes. In 2000, an estimated 39 percent of the injuries occurred to children under 15 years of age. Most injuries occurred to the arms, legs, faces, and heads. The most common injuries were fractures.

NOTES:

MOTORCYCLE HANDLEBARS

Vehicle Code Section 27801
Chapter 280 / Assembly Bill 2844

SUMMARY: This law modifies the motorcycle handlebar requirement in the Vehicle Code by allowing the maximum handlebar height to be extended to six inches above the operator's shoulder when sitting astride the motorcycle seat.

HIGHLIGHTS:

- Section 27801 VC currently requires the operator of a motorcycle to be able to reach the ground with both "his" feet, and prohibits the operation of a motorcycle with hand grips located higher than the operator's shoulders.
- This bill amends Section 27801 of the Vehicle Code (VC) providing that a person shall not operate a 2-wheel motorcycle that is equipped with handlebars that place the hands more than 6 inches above shoulder height.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law modifies the motorcycle handlebar requirement in the Vehicle Code by allowing the maximum handlebar height to be extended to six inches above the operator's shoulder when sitting astride the motorcycle seat.

NOTES:

VEHICLES

Vehicle Code Sections 9400.1, 4000.6, 1685, 1685.1, 24602, 35401, and 13370
Streets and Highways Code 1950
Chapter 615 / Senate Bill 1233

SUMMARY: This law cleans up inconsistency in S&H Code and clarifies that state highway use in golf cart transportation plans are limited to the crossing of, or the utilization of a golf cart path along a state highway, if authorization is obtained from the Department of Transportation (DOT), and the law enforcement agency having traffic enforcement jurisdiction.

This legislation also authorizes a tow truck operating under a valid annual transportation permit to travel beyond the 100 mile radius restriction without obtaining a single permit from DOT under specified circumstances, and prohibits DMV from issuing a Special Driver Certificate if the applicant has been convicted of certain felonies. Furthermore, this bill authorizes a motor vehicle to be equipped with a red fog lamp to the center of the rear of a vehicle, and authorizes a vehicle owned by specified utility companies to operate a mobile digital terminal in view of the driver during emergency situations. This law also requires DMV to provide permanent fleet registered vehicles registered on or after January 1, 2005, with a sticker differing from those issued to other fleet registered vehicles

HIGHLIGHTS:

- This legislation authorizes a tow truck operating under a valid annual transportation permit, and in combination with a single disabled vehicle or single abandoned vehicle, to exceed the 65 foot vehicle combination length requirement and travel beyond the 100 mile radius restriction without obtaining a single trip permit from DOT.

- This law prohibits the Department of Motor Vehicles (DMV) from issuing a California Special Driver Certificate (CSDC) for the operation of a school bus, school pupil activity bus (SPAB), youth bus (YB), general public paratransit vehicle (GPPV), or a vehicle for the transportation of developmentally-disabled persons if the applicant for such a certificate has been convicted of a specified felony, and would prohibit DMV from revoking a certificate holder's driver's license under specified circumstances.

- This law authorizes a motor vehicle to be equipped with a red fog lamp installed in the center of the rear of the vehicle.

- This law authorizes a vehicle owned by an electrical corporation, a local publicly owned electric utility company, a gas corporation, or a telephone corporation to operate a mobile digital terminal equipped with an opaque covering that does not allow the operator to read the monitor while driving, in view of the operator during specified emergency situations.

- This law requires DMV to provide permanent fleet registered vehicles registered on or after January 1, 2005, with a sticker differing from those issued to other fleet registered vehicles.

2005 LEGAL UPDATE

WHAT THIS BILL MEANS TO LAW ENFORCEMENT:

1) Golf cart transportation plans were originally established to provide residents of communities near golf courses to travel locally in their golf carts. Golf cart transportation plans are not allowed to include the use of any state highway or any portion thereof, and are required to have the prior approval of the appropriate transportation planning agency and the law enforcement agency of primary jurisdiction on proposed roadways.

2) Pursuant to Senate Law 612, signed by the Governor in June 2003, an exception was granted for golf carts or low-speed vehicles crossing State Highway 16 at Murieta Drive, and Murieta South Parkway.

3) Senate Law 315 of the 2003 legislative session allows a person to reapply for a CSDC no sooner than 45 days after denial or revocation in the case of failure to meet prescribed testing requirements.

4) Assembly Law 1742 of the 2002 legislative session amended Section 35401 VC by requiring the Department, in consultation with the Department of Transportation (DOT), to conduct a study of the effect that the exemption to the 65 foot length limitation for a combination of vehicles coupled together has on public safety. The report is to be given to the Legislature and the Governor on or before April 1, 2005. The exemption and study requirement are scheduled to sunset on January 1, 2008.

NOTES:

VEHICLES: FRONT LICENSE PLATE BRACKETS

Vehicle Code Section 11713.17
Chapter 365 / Assembly Bill 1272

SUMMARY: This bill prohibits a vehicle dealer, vehicle manufacturer, or distributor from delivering any vehicle unless the vehicle is equipped with a license plate bracket or other means of securing a front license plate, or the dealer obtains a written acknowledgment that the person expressly refused installation of a bracket or other means of securing the license plate and understands that California law requires a license plate to be displayed, and securely fastened to the front of the motor vehicle.

HIGHLIGHTS:

- This bill adds section 11713.17 to the Vehicle Code providing that upon the retail sale or lease of a motor vehicle which DMV issues two license plates, the automobile dealer shall not deliver the vehicle unless the vehicle is equipped with a bracket or other means of securing the license plates, or the dealer obtains a signed, written acknowledgment indicating the buyer understands California law requiring the use of a front license plate.

- This law requires the dealer to provide the necessary hardware to secure a front license plate, if the necessary equipment is not provided by the factory.

- This law requires a car dealer to provide information indicating a customer refused installation of a front license plate bracket or other means of securing a front license plate to the information required on the signed, written acknowledgment.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Under existing law, the Department of Motor Vehicles licenses and regulates dealers of motor vehicles. Existing law requires that when two license plates are issued by the department for use upon a vehicle, they shall be attached to the vehicle for which they were issued, one in the front and the other in the rear. Currently, the burden is placed completely upon the consumer. This law seeks to place a portion of the responsibility upon the dealership.

NOTES:

VEHICLES: REMOVAL BY A LAW ENFORCEMENT VOLUNTEER

Vehicle Code Section 22651.05
Chapter 371 / Assembly Bill 1847

SUMMARY: This bill created Section 22651.05 VC, authorizing law enforcement volunteers to remove (tow) vehicles which are in violation of a provision of law. This new law will eliminate the necessity of having sworn peace officers remove these vehicles, thereby increasing their availability for emergency incidents.

HIGHLIGHTS:

- The term "trained volunteer" is defined in the bill as a person who, of his or her free will, provides services, without any financial gain, to a local or state law enforcement agency, and who is duly trained and certified to remove a vehicle by local or state law enforcement agency.
- This section authorizes the removal of vehicles under the following conditions:
- When a vehicle is parked or left standing for more than 72 hours on a highway in violation of a local ordinance.
- When a vehicle parked or left standing on a highway interferes with the cleaning, maintenance, construction, or installation of utilities on that highway. Signs giving notice that the vehicle may be removed must be erected at least 24 hours prior to removal.
- Whenever local authorities have authorized a portion of a highway to be used for the movement of equipment, articles, or structures of unusual size and the parking of any vehicle interferes with this movement. Signs giving notice to such removal must be erected at least 24 hours prior to the removal.
- Whenever a vehicle is parked or left standing where a local ordinance has prohibited parking. Signs must be posted giving notice of the removal.
- Whenever a vehicle is parked for more than 24 hours on a portion of a highway located within the boundaries of a common interest development. Signs must be posted giving notice of the removal.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The Los Angeles County Sheriff's Department sponsored this bill with the intent of using their volunteers more efficiently, as well as creating more time for patrol deputies to handle emergency incidents.

NOTES:

VEHICLES: HEADLAMP USAGE / INCLEMENT WEATHER

Vehicle Code Section 24400
Chapter 415 / Assembly Bill 1854

SUMMARY: This bill amends Section 24400 VC, providing that every motor vehicle, other than a motorcycle, be operated with headlamps whenever weather conditions render visibility insufficient to clearly discern a person or other vehicle at a distance of 1000 feet, or when conditions require the windshield wipers to be in continuous use due to precipitation or atmospheric moisture.

HIGHLIGHTS:

- Section 24400 VC will require motor vehicles, except motorcycles, to operate two lighted headlamps during darkness and inclement weather.
- This section provides that "inclement weather" is a weather condition that is either of the following:

  A condition that prevents a motor vehicle operator from clearly discerning a person or another motor vehicle on the highway from a distance of 1000 feet.

  A condition requiring the windshield wipers to be in continuous use due to rain, mist, snow, fog, or other precipitation or atmospheric moisture.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Section 280 VC defines "darkness" as any time from on half hour after sunset to one half hour before sunrise, and any time when visibility is not sufficient to render discernible any person or vehicle on the highway at a distance of 1000 feet. Twenty-eight states have enacted laws to require drivers to have their headlights on in inclement weather.

NOTES:

TRAFFIC SIGNS AND SIGNALS

Vehicle Code Section 21461
Chapter 203 / Assembly Bill 1951

SUMMARY: This law expands the scope of Section 21461 of the Vehicle Code (VC), to include failure to obey a signs or signals that are defined as regulatory in the federal manual on Uniform Traffic Control Devices, or a Department of Transportation (DOT) approved supplement, that is erected or maintained to enhance traffic safety, and includes failure to obey a device erected or maintained by a public agency or official, rather than solely pursuant to a local ordinance or statewide statute.

HIGHLIGHTS:

- Currently, 21461 (a) VC makes it a crime for a driver to fail to obey signs or signals erected or maintained to enforce the provisions of the Vehicle Code, or local traffic ordinances and regulations that are maintained pursuant to a specific statute.

- This law amends Section 21461 (a) VC by providing that it is unlawful for a driver of a vehicle to fail to obey a sign or signal defined as regulatory in the **federal Manual on Uniform Traffic Control Devices, or a Department of Transportation (DOT) approved supplement to that manual** of a regulatory nature, erected or maintained to enhance traffic safety and operations, or to indicate and carry out the provisions of the Vehicle Code or a local traffic ordinance or resolution adopted pursuant to a local traffic ordinance, or to fail to obey a device erected or maintained by lawful authority of a public body or official.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The Federal Manual on Uniform Traffic Control Devices (MUTCD), which is produced by the U.S. Department of Transportation, contains standards for traffic control devices that regulate, warn, and guide road users along highways in all 50 states. Traffic control devices are important because they optimize traffic performance, promote uniformity nationwide, and help improve safety by reducing the number and severity of traffic collisions.

NOTES:

VEHICLES: SPEED CONTESTS

Vehicle Code Sections 23109 & 13352
Chapter 595 / Senate Bill 1541

SUMMARY: This bill increases the sanctions for convictions of Section 23109 of the Vehicle Code (VC), motor vehicle speed contest. In addition to the current sanctions, a person convicted of Section 23109 VC would be required to perform 40 hours of community service. The Department of Motor Vehicles (DMV) is required to restrict or suspend the driver's license of any person convicted of engaging in a motor vehicle speed contest. Additionally, a person whose driver's license is restricted or suspended for a conviction of speed contest is required to provide proof of financial responsibility as a condition to restore his or her driver's license.

HIGHLIGHTS:

- This law provides that any person convicted of a violation of subdivision (a) of 23109 VC shall be required to perform 40 hours of community service.
- The court may order the privilege to operate a motor vehicle suspended for 90 days to 6 months.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Speed contests pose a significant risk to the motoring public by placing a significant risk to lives, safety, and property. Tragic accidents have frequently resulted from speed contests on California roadways, causing unnecessary injury to innocent motorists and pedestrians, as well as those engaging in the speed contest.

NOTES:

VEHICLES: EXCESSIVE SPEED ENHANCEMENT PROVISIONS

Vehicle Code Section 22348
Chapter 300 /Assembly Bill 2237

SUMMARY: This bill amends section 22348 of the Vehicle Code by increasing fine amounts for second and subsequent convictions for driving in excess of 100 miles per hour (MPH).

HIGHLIGHTS:

- Existing law provides, upon a conviction for the offense of driving upon a highway in excess of 100 miles, for a driver to be assessed a fine not to exceed five hundred dollars. No enhanced fines are assessed for second or subsequent convictions.
- This bill provides for a fine of up to $750 for a conviction for a second offense committed within three years of the first offense.
- This bill provides for a fine of up to $1,000 for a conviction for a subsequent offense committed within five years of the first two or more offenses.
- Drivers' license suspension provisions under 22348 VC will not be altered by this bill. The court continues to have the option of suspending a driver's privileges upon conviction for a first offense. A conviction for a second offense within three years carries a suspension or restriction for six months. A conviction for a third or subsequent offense within five years carries a suspension or restriction for one year.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT In 2003, there were a total of 160,481 traffic collisions in California with unsafe speed as a primary collision factor. These collisions resulted in 655 fatalities and 89,258.

NOTES:

DRIVING UNDER THE INFLUENCE: SANCTIONS

Vehicle Code Sections 1808, 13352, & 23646, Government Code Section 68152 Chapter 550 / Senate Bill 1694

SUMMARY: This law enhances consequences for driving under the influence (DUI) recidivism by extends the current 7 year period required to impose increased sanctions on DUI offenders to 10 years.

The provisions of this bill require the court to order a person who has previously been convicted of a DUI offense over 10 years ago, or disorderly conduct based on public intoxication, and is currently charged with a DUI offense and convicted, to attend and complete a specified program.

Additionally, these new provisions require a court to order a person to participate in an alcohol and drug problem assessment program if the person is convicted of DUI offense that occurred within 10 years of a separate DUI conviction, and removes the requirement that a person had previously been court ordered to attend a licensed program and failed to comply with program rules.

HIGHLIGHTS:

- This new legislation maintains DUI convictions on a person's driving record for ten years, and would afford law enforcement the ability to charge a person with a felony for a fourth DUI offense, if all 4 offenses occurred within a 10 year time period as opposed to the previous 7 year condition.

- The requirement for the court to order a person who has previously been convicted of public intoxication within the past 10 years, and who has recently been convicted of a DUI offense, to attend and complete a specified DUI program, and the requirement for the court to order a person convicted of DUI in excess of 10 years, or has a previous conviction for public intoxication, to attend and complete a DUI program, could assist in identifying individuals with drug and alcohol problems, and help reduce DUI recidivism.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT Currently, persons convicted of 23152 or 23153 of the Vehicle Code (VC), on two or more occasions, are subject to a variety of sentencing enhancements provided the convictions occurred within a 7 year time period. This time period begins with the first conviction date, and includes a conviction for 23103 VC, when a plea bargain was entered to reduce a charge of 23152 VC, which is known as a "wet reckless."

The Department of Motor Vehicles concludes in the 2000 annual DUI statistical report that, "Alcohol treatment, in conjunction with license restriction, continued to be the most effective post-conviction sanction in reducing subsequent DUI incidents among DUI offenders."

NOTES:

DRIVING UNDER THE INFLUENCE: DRIVER LICENSE SANCTIONS

Vehicle Code Sections 1803, 13352, 13352.5, 13353, 13353.3, 13353.5, 13353.7, 13954, 14601.2, 23521, 23536, 23538, 23540, 23542, 23548,23552, 23556, 23562, 23568, 23660, 23665, 13352.4, & 13354, Health & Safety Code 11837
Chapter 550 / Senate Bill 1697

SUMMARY: This bill consolidates the driver license suspension, restriction, and revocation functions for DUI arrests and convictions under the Department of Motor Vehicles (DMV). This bill authorizes the court to disallow the issuance of a restricted license if the court determines that a person would present a traffic safety or public safety risk if allowed to operate a motor vehicle during a suspension period.

HIGHLIGHTS:

- This law provides that DMV shall give a restricted driver's license to a person who has been convicted of a second DUI and is participating in a DUI program.
- This law deletes the reference to "court ordered administered suspension or revocation" and the reference to speed contest violations and moves the authorization for suspension of license for a speed contest to the new Vehicle Code Section 13354.
- Section 13552 VC requires a person whose driver's license is suspended for DUI to complete a licensed DUI program prior to reinstatement of the license.
- This law repeals and recasts the provision providing that DMV shall issue the restricted license for to and from work to a person whose driver's license has been suspended if the person: submits proof of enrollment in a DUI program after the date of the current violation; submits proof of financial responsibility which shall be maintained for three years; pays all applicable reinstatement or reissue fees. DMV shall terminate the restriction if they are notified that the person has failed to comply with the DUI program requirements. The holder of a commercial license who was operating a commercial vehicle at the time of the DUI violation is not eligible for a restricted license.
- This law deletes the reference to probation and instead provides that the restricted license should be granted to a person whose driver's license was suspended, and in addition to enrollment in the program and payment of fees, requires that person to complete not less than 12 months of the suspension period imposed. The restriction shall remain in effect until the final day of the suspension imposed or until all the reinstatement requirements have been met.
- This bill also provides that, if upon conviction, the court determines that a person would present a risk to traffic safety or a public safety if authorized to operate a motor vehicle, the court may disallow a restricted license.
- This bill provides that the suspension or revocation imposed for a refusal to submit to a blood-alcohol test shall run concurrently with any restriction, suspension, or revocation imposed for the same arrest.
- This bill deletes the provisions of 13354 VC and instead puts in language authorizing the suspension of a license for speed contests. This bill requires the court at the time of sentencing to inform the defendant that their driving privilege may not be restored until the person provides poof to DMV of successful

completion of the appropriate DUI program.

- This bill also makes a number of other clarifying changes to complete the consolidation of the licensing sanctions with DMV.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Traffic fatalities involving intoxicated drivers have increased for four years in a row after a decade of declining rates. A total of 344 more people died on the road in California in 2002 than did in 1998. Felony DUI arrests have increased for three years after a similar decline. DUI drivers kill someone every eight hours in California-leaving families devastated and communities threatened. Nearly 180,000 people were arrested for driving under the influence of drugs or alcohol in 2002, including 25% who were repeat offenders, highlighting the need to make accountable those individuals and families who continue to suffer from alcohol and drug abuse. Driving under the influence of alcohol and drugs continues to be a significant threat to public health and safety. Despite significant progress in reducing incidents of DUI, repeat offenders who refuse to stop driving after sanctions by the courts threaten the public with reckless behavior.

NOTES:

VEHICLES: WIRELESS TELEPHONES

Vehicle Code Section 23125
Chapter 505 / Assembly Bill 2785

SUMMARY: This bill will prohibit the driver of a schoolbus or transit vehicle, which would include one operated on rails or tracks, which is used for public transportation service, from using a wireless telephone while driving.

HIGHLIGHTS:

- This law will prohibit the driver of a schoolbus or transit vehicle, which will include one operated on rails or tracks, which is used for public transportation service, from using a wireless telephone while driving.
- A driver will be exempt from these provisions if they are using a wireless phone for work-related provisions or for emergency purposes, such as contacting police, fire, or medical personnel.
- A violation of this law will be considered an infraction, and will not be considered a serious traffic violation for commercial licensing purposes.
- No fine structure is included in this bill.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Six states have banned the use of cell phones by school bus drivers (Arkansas, Connecticut, Illinois, New Jersey, Rhode Island and Tennessee). Two states have banned the use of cell phones by all bus drivers (Arizona and Massachusetts). Beginning January 1, 2005, bus drivers with the Los Angeles County Metropolitan Transportation Authority will not be allowed to talk on cell phones while driving.

NOTES:

VEHICLES: PREFERENTIAL LANES

Vehicle Code Sections 5205.5 and 21655.9
Chapter 728 / Assembly Bill 2628

SUMMARY: This law permits the issuance of a decal, label, or other identifier to specified hybrid vehicles, regardless of the number of passengers, that would authorize the use of exclusive or preferential highway lanes or access ramps, and would provide for toll free, or reduced rate passage on specified bridges. This law would prohibit the Department of Motor Vehicles (DMV) from issuing more than 75,000 decals, labels, or other identifiers. This law would also require DMV to stop issuing those decals, labels, or other identifiers, if the Department of Transportation (DOT) makes a determination requiring the stoppage, after at least 50,000 of those decals, labels, and identifiers are issued.

This law also requires these motor vehicle operators to obtain a specified account within the automatic vehicle identification system, and submit a form with specified personal information approved by DOT and the Bay Area Toll Authority. Furthermore, if the automatic vehicle identification system readers on all high-occupancy lanes on all of the specified toll bridges are not fully operational and funded by the Bay Area Toll Authority within 90 days of federal government approval of this program, the Metropolitan Transportation Commission would be required to grant toll-free or reduced passage to all vehicles displaying an identifier.

HIGHLIGHTS:

- 1) This bill only becomes operational if approved by the Federal Government.
- 2) This bill requires DOT to consider the following factors to determine if HOV lane service is breaking down as a result of this legislation:
  - Reduction in level of service.
  - Sustained stop-and-go conditions.
  - Slower than average speed than adjacent mixed flow lanes.
  - Consistent increase in travel time.
- This bill would require DOT to immediately notify DMV upon making the determination that significant HOV lane breakdown has occurred. DMV would then be required to halt the issuance of the decals, labels, and other identifiers.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Hybrid vehicles will have use of exclusive or preferential highway lanes or access ramps if equipped with a decal, label, or other identifier.

NOTES:

CASE

LAW

SUMMARIES

People v. Holloway

(2004) 33 Cal.4th 96

SUBJECT: Miranda; Custody & Interrogative Techniques

RULE: Telling a suspect that he is not in custody, despite the prior use of handcuffs, should negate the need for a *Miranda* admonishment at least where the interrogators act accordingly. And telling the suspect that there are personal benefits to being honest, so long as an offer of leniency is not inferred, is lawful.

FACTS: Defendant murdered Debra Cimmino and Diane Pencin, half sisters who lived together in Sacramento, in 1983. Both victims had been strangled to death with Diane suffering stab wounds as well, and Debra having been raped. Defendant, a parolee, had aspirations of being Debra's boyfriend. Defendant was due for a meeting with his parole officer, so detectives asked to be notified when he showed up. When defendant arrived for his appointment, the parole agent handcuffed him and called detectives. Upon finding defendant in handcuffs, the detectives immediately had the cuffs removed, telling defendant that that was a mistake and that they only wanted to talk to him about Debra and Diane's deaths. Defendant was asked if he would submit to an interview, giving him the option of either driving himself to the police station or accepting a ride with them. He was offered a ride home afterwards. At the police station, defendant was told that he was not under arrest and that they merely wanted to interview him as a part of their investigation, possibly eliminating him as a suspect. Without a *Miranda* advisal or waiver, defendant told the detectives that he had been with friends the evening of the murders and at his mother's house the next morning. Defendant was thereafter driven home, as promised. When physical evidence was later developed connecting defendant with the murders and his alibi fell apart, defendant was recontacted. This time he was advised of his *Miranda* rights, which he waived. Although admitting that his alibi was a lie, he continued to deny any involvement in the murders. At one point in the interrogation, one of the detectives stated that; "We're talking about a death penalty case here." Defendant was also told that "The truth cannot hurt you, if it's known. The longer you sit there and not say anything and you just ride with it, and you're just gone." He was also told that he would be "biting the bull (sic) for the whole thing" if he continued to deny guilt. After the detectives suggested that defendant maybe "blacked out," or "lost control of (his) temper," defendant, although continuing to deny guilt, eventually made admissions putting him at the scene that were used against him at trial. Defendant was convicted of both murders with special circumstances and sentenced to death. On automatic appeal to the California Supreme Court defendant argued that he should have been given his *Miranda* rights at the first interview. He also contended that in the second interview, the detectives impermissibly offered him leniency in exchange for his cooperation and threatened him with the death penalty if he didn't cooperate.

HELD: The California Supreme Court, in a unanimous decision, affirmed defendant's conviction and death sentence. As to the first interview, the Court upheld the trial court's determination that, under the circumstances, defendant was *not* in custody and therefore did not need to be *Mirandized*. "*Custody*," for purposes of *Miranda*, requires a formal arrest, or "a restraint on defendant's movement of the degree associated with a formal arrest." Even though the parole officer had handcuffed the defendant, the detectives immediately removed them, telling him that he was not under arrest. He was asked to come to the police station voluntarily, being offered the option of driving himself, and given a ride home afterwards as promised. Defendant was told that he was not even necessarily a suspect. The fact that defendant was a parolee at the time was held to be irrelevant. No reasonable person, whether or not a parolee, would have believed that he was "*in custody*" for purposes of *Miranda*. As to the second interview, the Court noted that "(t)he line 'can be a fine one' between urging a suspect to tell the truth by factually outlining the benefits that

may flow from confessing, which is permissible, and impliedly promising lenient treatment in exchange for a confession, which is not." So long as a defendant's choice to confess is "*essentially free*," and his "*will*" is not "*overborne*," there is no constitutional violation. Telling defendant that "the truth cannot hurt you" while pointing out the benefits of telling the truth, so long as it cannot reasonably be interpreted as an offer of a lighter sentence for doing so, is not improper. Also, mentioning the death penalty where death is a possibility is not an impermissible threat necessitating the suppression of the defendant's statements. In this case, the Court found that "the detectives . . . did not cross the line from proper exhortations to tell the truth into impermissible threats of punishment or promise of leniency." Defendant's statements from both interviews, therefore, were properly admitted into evidence against him.

NOTE: It can make a prosecutor cringe a little when they see an interrogator try to convince a suspect that there is some benefit in telling the truth, other than maybe emotionally by "getting it off his chest." Defendants who talk seldom, if ever, really help themselves from a legal standpoint. But so far the courts, including the California Supreme Court in this case, have consistently held that the "mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." It's important to remember to stay away from anything that even sounds like an "*offer of leniency*." Even an innocent hint that cooperation might result in a lesser charge or lighter sentence can result in a confession being tossed. Inferring to a defendant that he might benefit in some way by confessing comes pretty close to that "*thin line*" between proper interrogative technique and an implied promise of leniency. Be careful you don't push that envelope too far.

NOTES:

Yarborough v. Alvarado

(2004) 124 S.Ct. 2140

SUBJECT: Miranda; Custody and Juveniles

RULE: A suspect's age and lack of criminal experience are *not* factors that must be taken into consideration when determining whether he is in custody for purposes of *Miranda*.

FACTS: Defendant (17-years old at the time, but prosecuted as an adult) and another, hanging out at the mall, decided to carjack a man who was in the parking lot cleaning the trash out of his truck. The other subject, carrying a gun, approached the victim and shot him when the victim refused his demands for money and his car keys. Defendant was standing by during the shooting, ready to lend assistance (i.e., a co-principal). The victim died. Both subjects fled and defendant helped the shooter hide the gun. Los Angeles County Sheriff's Deputy Cheryl Comstock turned up defendant's name during her investigation as the second suspect involved in the murder. She eventually was able to contact defendant's mother, asking her to bring defendant to the station for an interview. Defendant was subsequently accompanied by both his parents to the Pico Rivera Sheriff's Station. Defendant's parents were told to wait in the lobby despite their request to be present during the interview. Detective Comstock interviewed defendant alone in a small interrogation room. Defendant was never *Mirandized*. In what was later conceded by defendant to be a pretty friendly conversation, with a sort of free flow between them, during which defendant never felt coerced or threatened in any way, defendant eventually (after first denying any knowledge of the murder) admitted to his limited participation. After a two-hour interview, defendant was returned to his parents and allowed to leave. He and the shooter were later charged with first degree murder and attempted robbery. The trial court ruled that defendant's statements were admissible in evidence in that despite the lack of a *Miranda* admonishment and waiver, the interview was non-custodial. Defendant's statements were used against him at trial. Although convicted of all counts by a jury, the trial judge reduced defendant's conviction to a second degree murder and sentenced him to 15-years-to-life. The Second District Court of Appeal affirmed. Defendant filed a writ of habeas corpus in federal court which was denied. However, the Ninth Circuit Court of Appeal reversed, holding that the trial court failed to take into consideration defendant's age and lack of criminal experience in determining whether a reasonable person, under the circumstances of his interrogation, would have believed that he was in custody. The government petitioned the U.S. Supreme Court for review.

HELD: The United States Supreme Court reversed. The U.S. Supreme Court found that the Ninth Circuit was clearly wrong in determining that the defendant's age was a factor that had to be considered in determining whether he was in custody. The test for whether a person is in custody for purposes of *Miranda* is an *objective* one: What would a reasonable person (*not* a reasonable juvenile) under the circumstances believe? Requiring police officers to take into consideration *subjective* factors such as the defendant's age is contrary to this rule. While age, criminal experience, and other factors personal to the suspect are relevant when determining issues such as the *voluntariness* of a statement, they are not relevant when evaluating the existence or non-existence of *custody* in a particular fact situation. Defendant's conviction, therefore, was upheld.

NOTE: In this case, by the way, a simple *Beheler admonishment* -- telling the suspect he was free to leave -- would have negated the whole custody issue here.

NOTES:

People v. Riva

(2003) 112 Cal.App.4th 981

SUBJECT: Miranda: Implied Waivers & Successive Interrogations

RULE: An *implied wavier* was sufficient under the facts of this case. And, while a new admonition upon reinitiating an interrogation is preferable, it may not be necessary depending upon the circumstances.

FACTS: Defendant shot at the occupants of another car. He missed, but one of the stray bullets stuck and injured a woman walking her grandchildren home from the store. Long Beach Police Department investigators later took defendant into custody and questioned him on the Long Beach City College campus where defendant attended classes. He was advised of his *Miranda* rights and asked if he understood his rights. When defendant said that he did, the officer started an interrogation without asking him if he waived those rights. Defendant made some incriminating statements before finally saying, "I don't want to say anything else right now." The interrogation ceased immediately and defendant was transported to jail. An hour after invoking, however, the same officer contacted defendant in the booking area of the jail and asked him if he was willing to speak with him at that time. Defendant said he would, so the interrogation was continued during which defendant further incriminated himself. Defendant was never asked for an express waiver nor was he readvised of his *Miranda* rights prior to the second interrogation. In subsequent court hearings, the trial judge ruled that the first interrogation was admissible in that defendant *impliedly* waived his rights by voluntarily answering questions. However, the judge suppressed the statements made during the second interrogation finding that they had been obtained in violation of his prior invocation. During the ensuing trial, however, a mistrial was declared due to the belated discovery of some new evidence. Prior to a second trial, a different trial judge ruled that defendant's statements during *both* interrogations were admissible, overruling the first judge's exclusion of the second interview. Defendant was convicted and appealed.

HELD: The Second District Court of Appeal (Div. 7) affirmed. As to the admissibility of the results of the first interrogation, the Court ruled that defendant *impliedly* waived his *Miranda* rights when he answered the officer's questions after being advised of his rights and saying that he understood them. There was no evidence to support the argument that defendant didn't understand his rights or that he was tricked or coerced into answering questions. He was an 18-year-old college student, had a job, and had been through the juvenile court justice system before. Based upon the *totality of the circumstances*, defendant *impliedly* waived his rights when, without showing any reluctance, he answered the officer's questions. The results of the second interrogation were also properly admitted into evidence. Defendant's previous invocation included a comment that he did not want to talk *at that time*. There was therefore nothing improper with the officer approaching defendant later and asking him if he *then* wished to continue the interrogation. While it would have been a good idea to give him a whole new *Miranda* advisal, and then obtain an *express waiver* of those rights, having failed to do so, based upon the *totality of the circumstances* present in this case, did not make his incriminating statements from the second interview involuntary.

NOTE: When possible, try to obtain an *express waiver* of *Miranda* rights by asking, "do you want to waive those rights and talk to me?" Also, be cautioned that the renewed questioning in this case was probably permitted in this case, despite the absence of a fresh set of *Miranda* warnings, because the suspect's invocation of silence was conditional: he did not want to talk *at that time*.

NOTES:

People v. Coffman

(2004) 34 Cal.4th 1

SUBJECT: Miranda; The Rescue Doctrine and Voluntariness

RULE: Ignoring a *Miranda* invocation and misleading the suspect as to the legal implications of continued interrogation does not require suppression of the resulting admissions where the *Rescue Doctrine* allows for continued questioning, and/or the defendant 's admissions were not the product of the interrogator 's errors.

FACTS: Defendants James Marlow and Cynthia Coffman kidnaped Corinna Novis at gunpoint in 1986, taking her and her car to a house in Redlands. Defendants forced Novis to provide them with her ATM PIN number. After sexually assaulting Novis, defendants drove her to a vineyard near Fontana where Marlow strangled her to death and buried her in a shallow grave. Defendants thereafter attempted to get money from Novis 's bank account and looted her apartment. About five days later, defendants kidnaped Lynell Murray from a Huntington Beach laundry where she worked. They took her to a local motel where they raped and strangled her to death. They then took Murray 's credit cards and other belongings, leaving her body in the motel room. Still driving Novis 's car and using Murray 's credit cards, defendants went to Big Bear. Because they used Murray 's credit cards to make purchases at local businesses, police were able to trace them to the Big Bear area where they were found walking down the highway after abandoning Novis 's car. A trail of witnesses and physical evidence, plus personal possessions from both victims found in their possession, tied defendants to both homicides. (In a separate prosecution, Marlow pled guilty to the Murray homicide and, after a jury trial on the penalty issue, was sentenced to death. [See *People v. Marlow* (2004) 34 Cal.4th 131.] Coffman was also convicted in the Murray homicide and sentenced to life without the possibility of parole.) Both defendants, in separate interviews, were advised of their *Miranda* rights. Both defendants invoked their rights, making repeated requests for the assistance of an attorney. However, the investigators ignored defendants ' attempts to invoke and conducted interrogations anyway, getting both to agree to show them where they could find Novis 's body. Marlow 's interrogator also continually advised him that because he had invoked his *Miranda* rights, whatever he told the officers in the course of the ensuing interrogation could not be used against him. In response to the defendants ' respective motions to suppress the results of their interrogations, the trial court ruled that despite the non-compliance with *Miranda*, the statements from both were *voluntary* and thus could be used for impeachment purposes. Their statements to the police were in fact admitted into evidence at trial to impeach their testimony. The trial court also ruled that the Novis 's body, even if it was the product of unconstitutional coercion, would have been inevitably discovered anyway. Both defendants were convicted of first degree murder and sentenced to death. The case was automatically appealed to the California Supreme Court.

HELD: The California Supreme Court unanimously affirmed. The Court first ruled that continuing the interrogation of the defendants for the purpose of attempting to locate Novis was lawful under the so-called *Rescue Doctrine*. At the time of the defendants ' interrogations, it was only known that Novis was missing. Marlow 's sister told investigators that defendant had been known to tie people up in rural locations and leave them. And there was no blood or other signs of trauma in Novis 's car or apartment. Because the victim had only been missing for a week, this passage of time lessen(ed) but by no means eliminat(ed) the possibility that she remained alive. Continuing the interrogation for the purpose of attempting to find the victim, therefore, was lawful despite the prior invocations. Aside from the applicability of the *Rescue Doctrine*, the Court also noted that ignoring defendants ' repeated requests for an attorney, and, as to Marlow, the investigator 's untrue comments about his statements not being admissible against him for any purpose, although giv(ing) *rise to concern* and *rais*(*ing*) *the specter of coercion*, thus causing an *issue* (*that*)

is close, the defendants ' statements were still properly admitted for impeachment purposes. The Court found that the unlawful questioning by the investigators is not what precipitated the later-obtained incriminating statements from defendants. Rather, it was sometime later in the interrogations, in response to the interrogators ' continually confronting each defendant with overwhelming evidence of their guilt, that they finally relented. And also, in both cases, even if the defendants ' admissions were the product of unconstitutional coercion, and thus error to allow the use of their statements even for impeachment purposes, the error was harmless beyond a reasonable doubt given all the other evidence of guilt. The Court further rejected Coffman 's argument that her interrogator offered her *leniency* when he made some innocuous comments about helping her. Also, the Court determined that evidence derived from Novis 's body was admissible in that, under the circumstances, the doctrine of *inevitable discovery* applied. Being buried in a shallow grave, she would have inevitably been found anyway. Lastly, the Court rejected Coffman 's complaint that the use of a jailhouse informant violated her Sixth Amendment right to counsel because the police put her in defendant 's cell knowing that she had been an informant on prior cases. Such a person is not a police agent absent some evidence that law enforcement did something to at least encourage the informant to pump Coffman for information. Here, because the informant was acting on her own, there was nothing improper with her passing information she obtained onto the police.

NOTE: Under the *Rescue Doctrine*, it is has been held that: *When life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent.* (*People v. Dean* (1974) 39 Cal.App.3rd 875.) This being the case, the defendants ' responses relative to Novis 's location could have been used in the People 's case-in-chief, and not just as rebuttal. *However,* with any number of California and federal cases holding that it is improper to purposely mislead an in-custody suspect as to the legal implications of an invocation (E.g.; see *People v. Bey* (1993) 21 Cal.App.4th 1623), and (aside from questions intended to locate the missing victim) that it is improper to purposely ignore a *Miranda* invocation (*Minnick v. Mississippi* (1990) 498 U.S. 146.), Some prosecutors just cannot understand why these investigators here thought that they were free to conduct the interrogations as they did. With this intentional violation of these defendants ' *Miranda* rights, compounded by misleading Marlow as to the legal implications of his invocation, these detectives generated some 14 pages of discussion by a very forgiving Supreme Court trying its hardest to avoid cutting these two cold-blooded killers loose. But remembering that as a death penalty case, with the Ninth Circuit yet to get its shot at this issue, you can bet your boots we haven 't heard the last on this.

NOTES:

Missouri v. Seibert

(2004) 124 S.Ct. 2601

SUBJECT: Miranda; Voluntariness of the Waiver

RULE: A statement is inadmissible if it is obtained as a result of a "two-step," "question-first" technique in which officers interrogate a suspect in custody, obtain a statement, provide *Miranda* warnings, obtain a waiver, and then get the suspect to repeat his earlier confession.

FACTS: Defendant's 12-year-old son, Jonathan, suffering from cerebral palsy, died in his sleep. Because Jonathan's body had a number of bedsores, defendant feared that she might get accused of neglecting him. She therefore decided, with the help of her sons, to incinerate him by setting fire to their mobile home. And to make sure no one could accuse her of leaving Jonathan home alone, she also planned to have Donald, a mentally ill teenager who was living with them, present in the trailer when they burned it. Prior to starting the fire, defendant made sure Donald ingested his Prozac knowing that this would make him sleepy. As according to the plan, Donald died in the fire. Defendant was subsequently taken into custody by a Missouri police officer. Without advising defendant of her *Miranda* rights, the officer questioned defendant about the fire and Donald's death for about 30 to 40 minutes, eventually getting her to admit that she intended Donald to die. She was then given a 20-minute coffee and cigarette break, after which the officer finally advised defendant of her rights and had her sign a written waiver. The officer then reminded defendant of the incriminating statements she had made earlier and had her repeat them. The officer later testified that this interrogation technique was one he had been taught on the job. Citing the U.S. Supreme Court decision of *Oregon v. Elstad* (1985) 470 U.S. 298, the Missouri state trial court held that because the first *unwarned* statements were not coerced, defendant's subsequent *Miranda* waiver was valid and her incriminatory statements made after her waiver were therefore admissible. (Everyone agreed that the statements made during the first, *un-Mirandized* interrogation were inadmissible.) The state's intermediate appellate court agreed, but the Missouri Supreme Court reversed. The State appealed to the United States Supreme Court.

HELD: The United States Supreme Court, in a 5-to-4 decision, affirmed the Missouri Supreme Court, finding the post-*Miranda* statements to be inadmissible. Per a *plurality* of four justices, defendant was in effect subjected to one continuous interrogation. The issue here is whether, during such two-step, question-first sequence, an in-custody criminal suspect is *adequately and effectively apprized* of his rights pursuant to the *Miranda* decision when he is *not* told of those rights until after his first confession, obtained during the initial, *un-Mirandized* interrogation. This, per the plurality, will depend upon an independent evaluation of the circumstances of each case. The plurality held that in this case, the defendant's *Miranda* advisal and waiver was legally inadequate. Telling a subject that she has the right to remain silent, etc., only after she has confessed in an earlier, un-warned interrogation, where the two parts to the interrogation are so close in time, conducted by the same interrogator about the same offense, and where reference is continually made back to the earlier, un-warned statements, does not convey to the defendant the knowledge that her earlier statements are inadmissible and that her self-incrimination rights, therefore, are still fully protected. For the intervening waiver to be valid, the defendant has to have the knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Unless also told that his earlier, *un-Mirandized* statements are inadmissible, he does not have the knowledge necessary for knowingly and intelligently understanding what it is he is giving up by waiving his rights after the mid-interrogation admonishment. The two-part interrogation technique as used here makes it unlikely that a criminal suspect would know the nature of the rights she is giving up by waiving *Miranda* after having already confessed once.

NOTE: The majority easily differentiated *Elstad* by noting that the pre-admonishment questioning of the defendant in *Elstad* was unintentional and comparatively insignificant. In contrast, the pre-admonishment questioning of the defendant in the present case was a full-scale interrogation done for the specific purpose of attempting to dilute the effects of the eventual *Miranda* admonishment, making it less likely the defendant would try to invoke. That the Supreme Court will not allow.

ALSO NOTE: While criticizing interrogative techniques used to circumvent the purposes behind the *Miranda* decision, the Supreme Court also specifically criticized the training provided by California's P.O.S.T. Commission (as well as others) where law enforcement officers are encouraged to ignore a suspect's attempt to invoke *Miranda* and to continue asking questions. Whatever you have been taught before, you should now know: do not purposely ignore *Miranda*!

NOTES:

United States v. Patane

(2004) 124 S.Ct. 2620

SUBJECT: Miranda and Fruit of the Poisonous Tree

RULE: The "*Fruit of the Poisonous Tree*" doctrine *does not* apply to evidence seized as a product of a non-coerced *Miranda* violation.

FACTS: Defendant violated a restraining order to stay away from his ex-girlfriend. A Colorado Springs police officer, while investigating this offense, received information that defendant, a convicted felon, also illegally possessed a .40 Glock pistol. Defendant was contacted at his residence where he was arrested after being asked about the restraining order violation. When the officers then attempted to advise defendant of his *Miranda* rights, he stopped them, telling them that he was aware of his rights. Without attempting to complete the *Miranda* admonishment, the officers asked defendant about his Glock. Defendant told officers where it was hidden and gave them permission to enter his bedroom to retrieve it. Charged in federal court with being a felon in possession of a firearm, defendant's motion to suppress the pistol was granted, the trial court ruling that the gun was the product of an illegal arrest conducted without probable cause. The court declined, however, to consider defendant's secondary argument that the pistol was also recovered as the product of a Fifth Amendment, *Miranda* violation. The Government appealed. The Tenth Circuit Court of Appeal affirmed. The Tenth Circuit, however, found that there *was* sufficient probable cause to arrest defendant for the restraining order violation, but agreed with defendant that the gun should have been suppressed as a direct product of a *Miranda* violation; the violation being the failure to complete the admonishment and obtain a waiver before asking him about the gun. The Tenth Circuit relied upon the recent U.S. Supreme Court decision of *Dickerson v. United States* (2000) 530 U.S. 428. *Dickerson*, per the Tenth Circuit, gave *Miranda* constitutional status, in effect overruling prior authority for the argument that the "*fruit of the poisonous tree*" doctrine did not apply to *Miranda* violations. The United States Supreme Court granted certiorari.

HELD: The United States Supreme Court, in a "*plurality decision*," reversed, holding that *Dickerson* did not effect the application of any of the prior evidence-admissibility rules of *Miranda*. In so ruling, the Court noted that a "negligent, or even deliberate" failure to "provide the suspect with the full panoply of warnings prescribed by *Miranda*" does not violate the Constitution, nor "*even the Miranda rule*," so long as the statements obtained as a result are not otherwise "*coerced*." The Fifth Amendment itself does no more than protect a defendant from having "*to be a witness against himself*:" I.e.; *it is a trial right*. It is therefore "only upon the admission of unwarned statements into evidence at trial" that a criminal defendant's constitutional and *Miranda* rights are violated. Because a police officer who ignores *Miranda* is *not* violating the Constitution, there is no occasion to invoke the "*fruit of the poisonous tree*" doctrine. Such suppression of derivative evidence is appropriate only in cases of a constitutional violation. The suppression of any statements obtained in violation of the *Miranda* rule in the prosecution's case-in-chief is a sufficient sanction.

NOTE: By "*plurality decision*," as noted above, it is meant that the above synopsis reflects the thinking, at least in this case, of only three of the nine Justices. Two other Justices agreed that the "*fruit of the poisonous tree*" doctrine does not apply in the *Miranda* context, thus providing the necessary 5 votes to overrule the Tenth Circuit. These Justices, however, declined to rule whether a criminal defendant's "*Miranda* rights" are violated by police officers who ignore the dictates of *Miranda*. But the majority decision on whether the physical products of a *Miranda* violation should be suppressed is what's important. Five

Justices have now ruled that such evidence is *not* subject to suppression. A minority of four Justices dissented altogether, finding that the "*fruit of the poisonous tree*" doctrine *should* apply to a *Miranda* violation. But please don't interpret this case as permission from the U.S. Supreme Court for you to purposely ignore *Miranda*.

NOTES:

Fellers v. United States

(2004) 124 S.Ct. 1019

SUBJECT: Sixth Amendment Right to an Attorney

RULE: The indictment of a criminal suspect triggers the suspect's *Sixth Amendment* right to counsel.

FACTS: Defendant was indicted by a grand jury on a charge of conspiracy to distribute methamphetamine. Lincoln, Nebraska, police and a county sheriff subsequently went to defendant's house with a warrant for his arrest. After being invited inside, the officers told defendant in a fifteen-minute conversation that they were there to discuss his involvement in methamphetamine distribution, naming for him four of his co-conspirators. Defendant admitted to knowing the four subjects, and to using methamphetamine with them on occasion. Defendant was then transported to jail where, for the first time, he was read his *Miranda* rights. After waiving his rights, defendant reiterated his involvement with the other four subjects and made other incriminating statements. Charged in federal court, defendant filed a motion to suppress his inculpatory statements. The federal Magistrate Judge granted the motion as to the statements he made in his home, those having been obtained without the benefit of a *Miranda* admonishment, and to portions of his later, post-*Miranda* statements. The trial judge overruled the magistrate, however, as to the post-*Miranda* statements, finding that defendant's waiver of his *Miranda* rights and the lack of any coercive tactics made defendant's post-*Miranda* statements admissible, per *Oregon v. Elstad* (1985) 470 U.S. 298. With his post-*Miranda* statements being used against him, defendant was convicted. He appealed, arguing that *all* the statements should have been suppressed as a product of a violation of his *Sixth Amendment* right to counsel. The Eight Circuit Court of Appeal affirmed although the justices could not agree upon the reasoning. Defendant appealed.

HELD: The United States Supreme Court reversed. First, the Court noted that by telling defendant in his home that they were there to discuss his involvement in the distribution of methamphetamine, they "*deliberately elicited*" incriminating information from him. This is a *Sixth Amendment* violation, having been done in the absence of his attorney or a waiver of his right to have an attorney present. Once the formal initiation of criminal proceedings occurs, "*whether by way of formal charge, preliminary hearing, indictment, information, or arraignment*," a defendant is entitled to the assistance of an attorney. Defendant here had already been indicted when the officers went to his home to talk to him about his methamphetamine distribution activities. The indictment having triggered his Sixth Amendment right to counsel (as opposed to his implied *Fifth Amendment* right to counsel, as discussed by *Miranda v. Arizona* (1966) 384 U.S. 436), defendant's constitutional rights were violated. The lower courts erroneously viewed this as a Fifth Amendment, *Miranda* issue, when in fact it is a Sixth Amendment, "*Massiah*" (*Massiah v. United States* (1964) 377 U.S. 201.) issue. While *Elstad* may, in the right circumstances, have the effect of allowing for the admission of a defendant's post-*Miranda* statements despite an earlier *Miranda* violation, the Supreme Court noted that they have never had occasion to rule on whether the same is true in the case of a Sixth Amendment, *Massiah* violation. They therefore remanded the case back to the Eight Circuit Court of Appeal for a consideration of the applicability of the "*fruit of the poisonous tree*" doctrine to a Sixth Amendment violation.

NOTES:

People v. Woods

(2004) 120 Cal.App.4th 929

SUBJECT: Prosecutorial Misconduct; Preventing a Witness from Testifying: Sixth Amendment Right to Counsel During the Investigative stage

RULE: (1) Holding a plea bargain with a co-principal in abeyance pending the completion of trial, thus preserving that co-principal's self-incrimination rights, does not deprive a defendant of a due process right to call witnesses where the trial court allows the co-principal's statements into evidence via hearsay witnesses. (2) A defendant's Sixth Amendment right to counsel is not implicated prior to formal charging in court.

FACTS: Defendant and the eventual victim, Horace McKenna, were California Highway Patrol officers until they quit and went into the strip club business together. However, the relationship soon soured because McKenna, as a huge, intimidating man who liked to "live large" and throw his weight around, made life difficult for defendant. In the early 1980's, defendant hired David Amos to work in the clubs. Defendant eventually solicited Amos to kill McKenna, giving him $50,000 for the job. Amos, in turn, hired John Sheridan to do the actual killing, paying him half the money. Finally, on March 9, 1989, Sheridan ambushed McKenna, killing him by machinegun fire. After a decade-long investigation, Sheridan was finally arrested for the murder. He ratted on Amos who eventually ratted on defendant. In exchange for leniency, Amos agreed to wear a wire so that police could listen to their conversation. Meeting at a Los Angeles deli, Amos pumped defendant for incriminating statements as the police listened in and as search warrants were being executed at defendant's clubs and residence. After defendant sufficiently implicated himself in McKenna's murder, he was arrested. Prior to trial, the prosecutor reached a plea agreement with Sheridan, offering him a reduced sentence in exchange for his testimony against defendant. However after the jury was picked, the prosecutor announced that Sheridan would not be used as a witness, and that they were putting off the consummation of his plea bargain until after the defendant was tried. Defendant then indicated an intent to call Sheridan as his witness himself, but Sheridan's attorney told the court that his client would invoke his Fifth Amendment self-incrimination right and refuse to testify pending the prosecutor's execution of the plea agreement. Defendant was eventually convicted of first degree murder and sentenced to prison. He appealed.

HELD: The Fourth District Court of Appeal (Div. 3) affirmed. Defendant's primary argument on appeal was that by making Sheridan unavailable as a witness, the prosecution had violated defendant's due process rights. The trial court, however, relaxed the rules of hearsay for defendant, allowing the defense to get into evidence Sheridan's statements through the testimony of other witnesses. The trial court also instructed the jury that they could use Sheridan's hearsay statements for their substantive truth (i.e., as if testified to by Sheridan, himself, and not just for impeachment or some other non-hearsay purpose). A prosecutor violates a defendant's due process rights when he or she interferes with the defendant's right to present witnesses. In this case, the prosecutor's refusal to consummate the plea deal with Sheridan until after defendant's trial did in fact cause Sheridan to be unavailable. However, there was a valid tactical purpose in doing this; i.e., to insure that Amos, if he testified, would know that he could not lie without being confronted by Sheridan's testimony. If the prosecutor allowed the plea deal to be consummated, there would be no guarantees that Sheridan would remain cooperative. Also, defendant got into evidence Sheridan's proposed testimony by other means, given the fact that the trial court relaxed the hearsay rules for him. So there was no real prejudice to defendant's case caused by the prosecutor's tactics. Also, the Court noted that the act of agreeing to accept a plea bargain does not, in itself, waive one's Fifth Amendment right against

self-incrimination. The privilege is in tack until the plea agreement is actually consummated. The Court also rejected defendant's argument that using Amos to pump him for information at the deli was a violation of his Sixth Amendment right to counsel. A criminal suspect's Sixth Amendment right to counsel is not implicated until that point where he has been formally charged in court; i.e., after the first formal charging proceeding. That point had not been reached where defendant, not yet arrested or charged, was being questioned by Amos. The case at that point was still in the investigation, as opposed to the accusation, stage.

NOTE: Messing with a criminal defendant's right to call witnesses in his defense is an issue not uncommonly overlooked in a prosecutor's zeal to present the truth. For instance, the threat to arrest witnesses for crimes revealed in their testimony (the seriousness of such a threat amply demonstrated by doing just that to one witness in full view of others waiting to testify) is a due process violation when the other witnesses subsequently refuse to testify for the defense. (People v. Martin (1987) 4 Cal.3rd 1.) Even in this case, the ruling might have been different had it not been for the judge giving the defense so much latitude in presenting hearsay evidence. So that issue should probably be avoided whenever possible. As to the Sixth Amendment issue, the defendant was not even close. While the Court notes some weak lower court authority to the effect that the Sixth Amendment right to counsel might be triggered at some point prior to the filing of charges in court, the Supreme Court has never so held. Unless and until that happens, the rule is clear: A subject's Sixth Amendment right to counsel does not attach until the filing of a formal charge, preliminary hearing, indictment, information, or arraignment.

NOTES:

People v. Wheelock

(2004) 117 Cal.App.4th 561

SUBJECT: Sixth Amendment Right to Counsel and Extradition

RULE: Neither having an attorney for extradition purposes, nor the issuance of an arrest warrant, triggers a defendant's trial right to an attorney under the Sixth Amendment.

FACTS: Defendant, an armed guard for Armored Transport, Inc., working out of Oakland, California, learned that his application for a card authorizing him to be a security guard had been rejected by the state. Knowing that this would mean that he would lose his job, he began making plans to steal the money from the armored truck he was assigned to, go to Canada, and become a professional assassin. (*I'm not making this up*! This is what this idiot later confessed to.) To accomplish this, defendant knew that he'd have to shoot his partner in the armored truck. On one of their runs, defendant shot his partner three times in the head and neck. Defendant then drove the truck to near a friend's house where he parked it and took as much money as he could carry, most of which he later left in a motel room when he saw a police car that happened to be parked out front. With his friend's help, defendant purchased a used car and headed north to start his life as an assassin. However, while lost on the back roads in Idaho, he changed his mind about his career plans and decided to go sightseeing in Colorado instead. While driving through Utah, he was stopped by a Utah highway patrol officer because of a lack of any license plates on his newly purchased, used car. Correctly identifying himself to the officer, it was discovered that an arrest warrant had been issued for him in California for robbery and murder. At some point after a Utah court appearance on the issue of extradition, for which defendant was appointed an attorney, an Alameda County prosecutor visited him in jail. After a full *Miranda* advisal and wavier, conducted without the presence of defendant's attorney, the prosecutor obtained a full, taped confession. Defendant was subsequently convicted of first degree murder with the special circumstance that the murder was committed during the commission of a robbery. He was sentenced to life without the possibility of parole. He appealed, arguing that, having been appointed an attorney for purposes of extradition, and due to the issuance of an arrest warrant, his confession had been obtained in violation of his Sixth Amendment rights

HELD: The First District Court of Appeal (Div. 3) affirmed. A "*Massiah*" violation (*Massiah v. United States* (1964) 377 U.S. 201.) occurs when a law enforcement official (which includes the prosecutor) interrogates a defendant who has been arraigned (or indicted, or otherwise having made his first court appearance) and appointed (or retained) an attorney. To have such contact with a charged criminal defendant, without the participation of the defendant's attorney, is a *Sixth Amendment* violation of that defendant's right to the assistance of counsel (as opposed to his *Fifth Amendment* right to the assistance of counsel during a pre-arraignment, in-custody interrogation). But a *Massiah* violation occurs *only* when being questioned on a charged criminal offense. In this case, defendant had been appointed an attorney for purposes of the extradition proceedings only; not for the homicide prosecution. Not yet having been arraigned or indicted on the murder, his Sixth Amendment right to counsel on that charge was not yet effective. Also, the issuance of an arrest warrant does not trigger a defendant's Sixth Amendment rights. Defendant's *Massiah* rights, therefore, had not been violated.

NOTE: The decision on the issue of an extradition proceeding's effects on a suspect's Sixth Amendment rights is one of first impression for the California. However, there are at a number of federal appellate courts that have reached the same conclusion. A Sixth Amendment right is what they call, "*offense-specific*," which means that it only applies to the charged crime. By "*charged*," we mean that the defendant has been

subjected to a "*formal* (*court*) *charge, preliminary hearing, indictment, information, or arraignment*." Neither the extradition-stage of a criminal action, nor the issuance of a pre-charging arrest warrant (i.e., a "*Ramey warrant*"), triggers a defendant's Sixth Amendment rights. And it also has to be remembered that this is a whole separate issue from one's *Fifth Amendment* implied right to the assistance of counsel which kicks in during a custodial interrogation, as dictated by *Miranda*. Getting the two issues confused often leads to mistakes at both the law enforcement investigation level and the trial court admissibility-of-evidence level. It's important to understand the differences between the two.

NOTES:

Randolph v. People of the State of Cal.

(9th Cir. 2004) 380 F.3d 1133

SUBJECT: Jailhouse Informants and the Sixth Amendment Right to Counsel

RULE: Using a jailhouse informant to "*deliberately elicit*" information from a charged criminal defendant is a Sixth Amendment right to counsel violation.

FACTS: Defendant, with an IQ of 59, was arrested and charged with the murder of a ten-year-old child. The victim's father was the initial suspect, but there was never enough evidence with which to charge him. Two years after the murder, new information eventually lead to defendant's arrest and prosecution. Tried on the theory that defendant killed the child at the instigation of the victim's father, the first jury hung (8 to 4 for guilty). Subsequently, a cellmate of defendant's, Ronnie Moore, went to prosecutors offering to testify in exchange for a deal on his own case, claiming that defendant had admitted to him that he was the killer. In later hearings on the admissibility of Moore's proposed testimony, there was a conflict as to whether or not prosecutors received this information in their first meeting with Moore, or not until after Moore was sent back to jail with instructions to collect incriminating statements from defendant. Defendant's motion to exclude Moore's testimony was denied. Moore's testimony contributed to defendant's conviction for first degree murder in a second trial. Sentenced to 27-years-to-life, defendant appealed, arguing a number of constitutional issues including that he had been deprived of his Sixth Amendment right to counsel when prosecutors used Moore as their agent, seeking incriminating statements from him after he had been formally charged with murder. After exhausting his state court remedies with no success, defendant sought habeas corpus relief in federal court. The federal district court's denial of defendant's petition was appealed to the Ninth Circuit Court of Appeal.

HELD: The Ninth Circuit Court of Appeal reversed, remanding the case back to the federal district court for further hearings. Once a defendant is formally charged (i.e., he's been arraigned in court) for a particular offense (i.e., the murder charge in this case), any attempt by the government or its agents to "*deliberately elicit*" incriminating statements is a violation of the defendant's Sixth Amendment right to counsel. The United States Supreme Court previously held in *United States v. Henry* (1980) 447 U.S. 264, that purposely putting a paid informant into a jail cell with a defendant under circumstances where the government officials "must have known that such propinquity (i.e., "nearness" or "close proximity.") likely would lead to that result" (i.e., the defendant making incriminating statements) is a Sixth Amendment violation. The fact that the informant was specifically told not to pump the defendant for any information is irrelevant, at least under the facts of *Henry*. The *Henry* Court noted three significant non-exclusive factors that were relevant to Mr. Henry: (1) The informant was acting under instructions from the government and was paid for his actions; (2) the informant was ostensibly no more than a fellow inmate, causing the defendant to trust him and thus being more likely to make incriminating statements; and (3) the defendant was in custody and under indictment. However, on the other side of a thin line on this issue is *Kuhlmann v. Wilson* (1986) 477 U.S. 436, in which the Supreme Court found it *not* to be a Sixth Amendment violation where, although purposely being placed in close proximity with the defendant in his prison cell, the informant made no effort to stimulate a conversation about the crime charged. In the present case, there was conflicting evidence on the issue of whether the incriminating statements were obtained by Moore from defendant *before* (acting on his own) or after (acting as a law enforcement agent) he met with prosecutors. The district court failed to determine when, in the sequence of events, Moore had obtained from defendant the statements to which he was allowed to testify at defendant's trial (i.e., before or after being anointed a "*state agent*"). Secondly, if Moore did in fact obtain defendant's incriminating statements while he was acting as a government agent, it was

unclear what Moore did, or did not do, to get defendant to make those statements; i.e., whether or not he "*deliberately elicited*" incriminating statements from defendant? Therefore, the case was remanded to the district court for a hearing on these issues.

NOTES:

Crawford v. Washington

(2004) 124 S.Ct. 1354

SUBJECT: Admissibility of Hearsay

RULE: Statements made by witnesses during formal interrogation will not be admissible in court, even if the statements fall within a hearsay exception, unless it can be shown the witness is unavailable and the defendant had a prior opportunity to confront and cross-examine the witness.

FACTS: A Washington state defendant was charged with stabbing a man who allegedly tried to rape the defendant's wife. Police investigators interviewed both the defendant and his wife regarding the incident. Both gave fairly consistent accounts of what had led up to the assault. However, the wife's description of the fight itself differed in part from the defendant's description of the fight in that, unlike the defendant, she said she did not see a weapon in the victim's hand. At trial, the defendant claimed self-defense. The wife did not testify because of a Washington state marital privilege that generally bars a spouse from testifying without the other spouse's consent. However, the wife's out-of-court statement to the police was admitted under a hearsay exception for statements against penal interest. At trial, and before the Washington State Supreme Court, the defendant unsuccessfully claimed that admission of the statement would violate his Sixth Amendment right to confront and cross-examine witnesses.
The Washington State Supreme Court which held that the statement was admissible over Confrontation Clause objection because it bore guarantees of trustworthiness.

HELD: The United States Supreme Court reversed the conviction, ruling that the wife's statement was inadmissible over Confrontation Clause objection -regardless of whether it fell within the hearsay exception for declarations against penal interest. The Court adopted a new test for determining whether out of court statements are admissible over Confrontation Clause objection, holding the admission of an out-of-court statement of an unavailable witness is barred by the Confrontation Clause if the statement constitutes "testimonial" hearsay (regardless of whether it had guarantees of trustworthiness) unless the witness is shown to be, in fact, unavailable and the statement is not being offered to prove what was said or the defendant has had an opportunity to cross-examine the witness about the statement.. The Court didn't give a full-blown definition of what is "testimonial" hearsay but held that it included statements made during police interrogation.

NOTE: Keep in mind that even without ***Crawford***, a statement made by someone outside of the courtroom is generally considered hearsay and is inadmissible in court unless it falls within a hearsay exception. ***Crawford*** just puts limits on the prosecution's ability to use certain hearsay exceptions to get statements into evidence when the person who made the statement doesn't testify in court. Some of the exceptions which prosecutors will no longer be able to use to introduce the statements of unavailable witnesses include (I) the exception for declarations against penal interest (Evid. Code, § 1230) made during police interrogation (i.e., when one suspect says something incriminating himself and his co-defendant, it won't be admissible in the co-defendant's trial); (ii) the exception for statements made by victims of elder abuse (Evid. Code, § 1380); (iii) the exception for statements made by a minor relating to abuse (Evid. Code, § 1360) if made to police; and (iv) the exception for statements of infliction or threat of infliction of physical injury (Evid. Code, § 1370) if made to police. On the other hand, ***Crawford*** will **not** affect the admissibility of statements falling into the exceptions for dying declarations, spontaneous statements (i.e., many 911 calls), business records, statements made in furtherance of a conspiracy, and confessions.

NOTES:

People v. Jiles

(2004) 122 Cal.App.4th 504

SUBJECT: Admissibility of Hearsay

RULE: A statement made by a homicide victim to the police while she lay dying can come into evidence over an objection that its admission violates the Sixth Amendment right to confront and cross-examine witnesses.

FACTS: Neighbors called police upon hearing a woman screaming. The responding police officer found the woman sitting on the front step of her residence, bleeding profusely from multiple stab wounds, hysterical, and having great difficulty breathing. The officer asked the woman what had happened. She said that defendant (her estranged husband) had "beaten (her) up." When asked why she was bleeding so much, she said that defendant had stabbed her with a screwdriver. She also complained of difficulty breathing (a lung had been punctured), and then passed out. She died an hour later at the hospital.
At defendant's trial, the woman's statement was admitted into evidence under the hearsay exception for spontaneous statements and also as a dying declaration. The defendant objected that the admission of the statement violated his right to confront and cross-examine witnesses in light of the recent United States Supreme Court decision in *Crawford v. Washington* (2004) 124 S.Ct. 1354 because the victim did not testify in court.

HELD: The court held that admissibility of the statements were not barred by the Confrontation Clause of the Sixth Amendment as interpreted in *Crawford* because the Confrontation Clause does not bar the admission of out of court statements falling with a hearsay exception -even when the person who made the statement is not available to testify - where the defendant is responsible for making the person unavailable (i.e., by killing her). This will often be the case when the statement is a dying declaration.

NOTES:

People v. Pirwani

(2004) 119 Cal.App.4th 770

SUBJECT: Hearsay & Sixth Amendment Confrontation

RULE: (1) Statements alleging a criminal offense made to the police by a later-deceased victim, absent an opportunity for the defendant to cross-examine that victim, are inadmissible. (2) Statements made by the victim to a friend are not admissible as spontaneous declarations where there is time for deliberation and reflection.

FACTS: Defendant was the Director of Nursing for a 24-hour, residential, intermediate-care facility in Palo Alto called "Casa Olga" for physically dependent adults. The victim, Ebaugh, was a 40-year-old dependent adult who was suffering from a number of physical and emotional ailments. Defendant took Ebaugh under her wing in what was described as an "unusually close staff/patient relationship." In 1999, Ebaugh received a lump sum payment of $90,050 from earlier gambling winnings. Defendant volunteered to manage her money for her. Over the next two years, defendant siphoned off about $55,000 of Ebaugh's money for her own personal expenses. By the end of January, 2001, Ebaugh discovered that she was out of money and that defendant had been helping herself. On February 1, 2001, a "very upset" Ebaugh called Sandra Louth, a crisis counselor who had been assisting Ebaugh for years, to complain that defendant had stolen all her money. Louth made an appointment for Ebaugh for two days later to discuss the problem. Ebaugh, in the mean time, reported the theft to the police. On February 3, Ebaugh was interviewed by Louth who obtained a detailed statement as to defendant's illegal transactions with Ebough's money. During this interview, Ebaugh was "'was tearful' but 'not sobbing. . . . She was calm . . . not hysterical . . . . She had tears in her eyes. And she was . . . looking very confused [asking] how she could have done this to me?'" Six months later, on July 25, 2001, Ebaugh gave a videotaped interview to a Palo Alto police detective. Ebaugh died two days later. Charged with financial dependant abuse (Pen. Code, § 368, subd. (e)) and grand theft (Pen. Code, § 487, subd. (a)), defendant claimed that Ebaugh knew of, and approved, all her uses of the money. Over defendant's objection, the prosecution was allowed to enter into evidence the videotape of Ebaugh's statement to the police, pursuant to Evidence Code section 1380 (Videotaped Statements of Elder or Dependent Adult Abuse), and Louth's testimony about what Ebaugh had told her in February, 2001, pursuant to Evidence Code section 1240 (Spontaneous Declaration). Defendant was convicted. She appealed her conviction arguing a violation of her Sixth Amendment right to confront her accusers, and that Ebaugh's statements to Louth did not qualify as a spontaneous declaration.

HELD: The Sixth District Court of Appeal reversed. Pending the appeal on this case, the United States Supreme Court decided the case of *Crawford v. Washington* (2004) __ U.S. ___ [124 S.Ct. 1354; 158 L.Ed.2d 177]. *Crawford* held that state statutory hearsay exceptions (such as Evid. Code, §§ 1380 & 1240) may be in violation of the Sixth Amendment's right to confrontation unless it is proved that (1) the person, whose out-of-court statements are sought to be introduced into evidence, is unavailable to testify at trial, and (2) the defendant has had an opportunity to cross examine that person. *Crawford* applies only to what the Supreme Court referred to as "testimonial" statements. Although not specifically defined, the term "testimonial" was held to include structured questioning by law enforcement. Although Ebaugh, having died prior to trial, was indeed unavailable, defendant never had the opportunity to cross-examine her as to her statements she made to the police on the videotape. Admission into evidence of the videotape, therefore, was improper. As to Louth's testimony about what Ebaugh had told her in February, the Court held that the spontaneous declaration exception to the hearsay rule did not apply to this situation. Hearsay, absent an exception, is not admissible in court. Spontaneous declarations are an exception to the hearsay rule

because of the lack of time for "deliberation and reflection" between an exciting event and the later uttering of words (i.e., the "declaration") describing the exciting event. Here, Ebaugh's statement to Louth occurred two days after Ebaugh first learned that she had been the victim of a theft, during which time Ebaugh had the presence of mind to file a police report. Although the lapse of time alone is not determinative, the facts do not support the trial court's conclusion that Ebaugh's statements to Louth, made with plenty of time for deliberation and reflection, were a spontaneous declaration. Louth, therefore, should not have been allowed to testify to what Ebaugh told her. Since the errors were not harmless, defendant's convictions were reversed.

NOTE: Students of *Crawford* and the Sixth Amendment should read the text of this case because the reasoning behind *Crawford* is discussed in detail and with clarity. In light of *Crawford*, this Appellate Court had little choice in ruling as it did. As to the spontaneous declaration issue, that exception to the hearsay rule is sometimes referred to as the excited utterance exception. While it is noted in the decision that the passage of two days between the exciting event and the hearsay-declarant's later verbal description of that event is not necessarily determinative, the passage of time, as a person calms down, is certainly a significant factor to consider.

NOTES:

People v. Sisavath

(2004) 118 Cal.App.4th 1396

SUBJECT: Hearsay and the Sixth Amendment Right to Confrontation

RULE: Hearsay statements of a four-year-old child alleging child abuse, after the child is ruled incompetent to testify, are *inadmissible* against a defendant absent an opportunity for the defendant to cross-examine the child despite the hearsay exception provided for in E.C. §1360.

FACTS: Defendant babysat for Ly N. over a four-month period, taking care of Ly's two female children, ages 8 and 4 (Victims #1 and #2, respectively). Eventually, Victim #2 complained to Ly that defendant had touched her "private parts" the night before. Victim #1 told Ly that defendant did similar things to her. The police were called. Both victims were interviewed by the responding police officer. Victim #2 was also later interviewed on videotape by a trained interviewer at Fresno County's Multidisciplinary Interview Center (MDIC); a facility specially designed and staffed for interviewing children suspected of being victims of abuse. Defendant was charged with ten separate child molest-related felonies; six counts involving Victim #1 and four counts with Victim #2, plus two drug-related offenses. In a pretrial hearing, Victim #2 (the four-year-old) was put on the stand to test her competency to testify. After failing to respond to most of the questions asked, the trial court ruled that she was not legally competent to testify because she was unable to express herself (Evid. Code §701(a)) and incapable of understanding her duty to tell the truth. (E.C. §701(b)) The prosecutor then moved to admit into evidence Victim #2's two hearsay statements; i.e., the statements made to the police officer and the videotaped statements made at MDIC. Finding victim #2 to be "*unavailable*" to testify (due to her incompetency), and that her hearsay statements had "*sufficient indicia or reliability*," the trial court ruled that the elements of E.C. §1360 (Statements of a child under the age of 12, describing an act of child abuse) were met, making her out-of-court hearsay statements admissible at trial. Defendant was tried and convicted on all counts except for two counts involving Victim #1. Sentenced to 32 years-to-life in state prison, defendant appealed.

HELD: The Fifth District Court of Appeal reversed those counts involving Victim #2; the four-year-old. While this appeal was pending, the United States Supreme Court decided the case of *Crawford v. Washington* (2004) 158 L.Ed.2nd 177. Reversing prior authority, *Crawford* held that a hearsay declarant's out-of-court "*testimonial*" statements made to the police are inadmissible at trial as a Sixth Amendment violation unless the defendant has had a prior opportunity to confront and cross-examine that declarant. In other words, a police officer won't be allowed to testify to what that victim or witness (the "*declarant*") told him, despite an applicable exception to the hearsay rule. In this case, the defendant did not have the opportunity to cross-examine Victim #2. The only issue here was whether her statements to the police officer and to MDIC were "*testimonial*." Unfortunately, the Supreme Court in *Crawford* specifically declined to define what they meant by "*testimonial*." The Supreme Court did note, however, that "*testimonial*" statements would include statements made during a police interrogation, or any "*structured police questioning*." The appellate court here interpreted this to mean, paraphrasing the Supreme Court's language, that; "(t)he pertinent question is whether an objective observer would reasonably expect the statement to be *available* for use in a prosecution." Victim #2's statements to the police officer clearly fall into this category. Also, even though the MDIC interviewer was not a law enforcement officer, the criminal case against defendant had already been filed and law enforcement personnel (i.e., the prosecutor and a D.A. investigator) were present for the interview. The statements to the MDIC interviewer, therefore, were also "*testimonial*." The hearsay testimony of either witness should *not* have been admitted into evidence.

NOTE: Hinging the whole issue on whether the challenged hearsay statements are "*testimonial*," as the Supreme Court did in *Crawford*, and then declining to define the term for us, was a mean trick. As a result, you

can expect a whole bunch of new cases like this one trying to guess what the Supreme Court meant by "*testimonial*," while we mere mortals at ground zero merely flail around in ignorance. Per the Supreme Court in *Crawford*, however, prior statements that are *not* "*testimonial*" include information obtained from business records (E.C. § 1271), statements made in furtherance of a conspiracy (E.C. § 1223), and maybe even a "*dying declaration*" (E.C. § 1242). Also, an "*off-hand*, *overheard remark*" does not necessarily involve the Sixth Amendment. Further, it is apparent that statements offered on some other issue than to establish the "*truth of the matter asserted*" in the statement (e.g., information used by a police officer to establish probable cause, or, arguably, statements used to impeach a witness when he or she testifies and lies), are *not* barred by the Sixth Amendment. As to what statements *are* "*testimonial*," the Supreme Court indicated that, in addition to those obtained in a law enforcement-controlled interrogation, a witness's prior testimony at a preliminary hearing, grand jury hearing, or trial are included. "*Testimonial*" may also include statements contained in affidavits and depositions, depending upon what the courts eventually determine "*testimonial*" to mean. If you haven't already thought about it, in addition to affecting E.C. § 1360, this new rule puts into jeopardy the admissibility of statements of a deceased gang victim (E.C. § 1231) and perhaps that of an unavailable child abuse victim under the age of 12 to establish corpus, pursuant to E.C. § 1228. This could get *real* messy before we're done.

NOTES:

People v. Hoeninghaus

(2004) 120 Cal.App.4th 1180

SUBJECT: Fourth Waiver Searches; Belatedly Discovered Conditions

RULE: A belatedly discovered Fourth waiver condition may not be used to validate an otherwise illegal search, irrespective of whether the Fourth wavier is based upon a probationary or a parole condition.

FACTS: Santa Cruz County Sheriff's Deputies were conducting a narcotics-related sweep in a brushy area known for harboring drug users and typically littered with discarded needles and drug paraphernalia. While the deputies were attending to two other arrestees, defendant came wandering out of the bushes. With visible needle marks and restricted pupils, defendant was contacted and questioned. Defendant, becoming nervous, denied that he was using drugs, claiming that he was just "walking around." After a closer check of his condition, he was arrested for being under the influence of a controlled substance. A search incident to arrest resulted in recovery of a vial of liquid that tested presumptively for opiates. Defendant's car was found nearby and searched. In the car was found drug paraphernalia and three grams of a substance that also tested positive for opiates. It was then learned that he was on probation and subject to search and seizure conditions (i.e., a "*Fourth Waiver*.") The trial court denied defendant's motion to suppress the evidence based upon the Fourth wavier, ignoring the prosecution's alternate argument that the deputies also had probable cause to arrest and search. Defendant pled guilty to possession of heroin and appealed.

HELD: The Sixth District Court of Appeal reversed and remanded the case back to the trial court to consider the prosecution's alternate argument that the deputies had probable cause. After judgment was entered in this case, the California Supreme Court decided *People v. Sanders* (2003) 31 Cal.4th 318, holding that an adult parolee's Fourth wavier, when unknown to police officers at the time they conduct an otherwise illegal search, will *not* validate the legality of the search when the search and seizure condition is later discovered. Reviewing the case law history of this rule, the Court noted the prior Supreme Court decision of *In re Tyrell J.* (1994) 8 Cal.4th 68, where it was held that a juvenile probationer was subject to the "*special needs*" of the juvenile probationary system to promote rehabilitation. Having given up any "*reasonable expectation of privacy*," advanced knowledge of the search and seizure condition, although "desirable," was not legally necessary to validate a warrantless search of the juvenile's person. The Court then noted, however, the Supreme Court's own subsequent criticism of *Tyrell J.* as having perhaps gone too far. Without specifically overruling *Tyrell J.*, the Supreme Court has refused to extend its holding to adult probation or parole situations. *Sanders*, and other cases leading up to *Sanders*, have noted that a Fourth Wavier search "must be reasonably and objectively related to the purposes of probation (or parole); and, if the officer is unaware of any search condition, there can be no (such) relationship, . . ." Finding that the rule of *Sanders* is equally applicable to *probation* as well as *parole* Fourth waivers, the search of defendant in this case cannot be upheld under the theory of a belatedly discovered waiver condition. However, the Court also noted that the deputies might very well have had "*probable cause*" to arrest and search defendant, and to search his car. The case, therefore, was remanded back to the trial court for further hearings on this issue.

NOTES:

People v. Lazalde

(2004) 120 Cal.App.4th 858

SUBJECT: Probation Search Clauses (Fourth Waivers)

RULE: A belatedly discovered probation search condition (i.e., a "Fourth Waiver") will not save an otherwise illegal search of a motel room.

FACTS: Over the course of several days, police saw the defendant conducting hand-to-hand narcotics transactions at a shopping center then going to a nearby motel. The police obtained a telephonic search warrant for a room in the motel and executed the warrant, finding heroin and other evidence of trafficking. However, it turned out that there was a problem with the procedures used in obtaining the warrant and the warrant was thrown out as invalid. The prosecution then sought to justify the search under defendant's probation search clause (i.e., a "Fourth waiver") - a search clause that was unknown to the officers until after the search had been completed. Defendant filed a motion to suppress the evidence which was denied.

HELD: The court of appeal initially ruled in the prosecutor's favor but the California Supreme Court took up the case and then sent it back down to the court of appeal telling them to make their decision in light of *People v. Sanders* (2003) 31 Cal.4th 318. In *Sanders*, the California Supreme Court held that a belatedly discovered "parole" search and seizure condition did not save an otherwise illegal search of an apartment. The *Lazalde* court of appeal, extended the rationale used in *Sanders* to probation searches and found the search of defendant's motel room could not be legally justified by a belatedly discovered probation search clause.

NOTE: This case is consistent with every other case coming down since *Sanders*, and all finding that belatedly discovered search and seizure conditions will not save an otherwise illegal search: *People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180; *People v. Hester* (2004) 119 Cal.App.4th 376; and *People v. Bowers* (2004) 117 Cal.App.4th 1261. Thus, with the possible exception of a juvenile probationer found on the street, just know that you won't be able to justify an otherwise illegal search on the basis that the guy was on a Fourth Waiver that you didn't know about at the time. That is, "luck out" searches have run out of luck.

NOTES:

People v. Hester

(2004) 119 Cal.App.4th 376

SUBJECT: Traffic Stops and Reasonable Suspicion: Fourth Waiver Conditions Discovered After the Fact

RULE: (1) A detention of apparent gang members following a gang-related drive-by shooting requires more information than the fact that the persons stopped appear to be members of a gang. (2) An after-the-fact discovery of a probation condition will not save what was otherwise an illegal traffic stop.

FACTS: A drive-by shooting occurred in a Bakersfield park, killing two and injuring two. Some of the victims were members of the "Country Boy Crips," a criminal street gang. Bakersfield's "East Side Crips" are rivals of the Country Boy Crips and were suspected of having committed the shooting. At about 12:30 a.m., six hours after the shooting, two Bakersfield police officers observed three vehicles driving side-by-side on a three-lane street in an area known to be East Side Crips' territory. The three vehicles changed formation into a single row as they entered a left-turn lane. The officers, spotlighting the three vehicles, could see that there were four persons in each car. In one car, the officers could see four Black males, all age 15 to 25 years. One of the Black males was recognized as a person who was a member of the East Side Crips. In the second vehicle, at least two of the occupants were Black males. The race, sex or age of occupants of the third vehicle could not be determined. The officers later testified that they believed the East Side Crips would be armed in that they would be expecting immediate retaliation for the earlier drive-by shooting. They also testified to believing that the East Side Crips members would be moving around in large groups, for "safety-in-numbers" purposes. The vehicle in which the East Side Crips gang member was riding was stopped by the officers. One of the passengers was observed with a handgun which was subsequently found hidden under the seat. All four subjects were arrested for conspiracy to carry a loaded firearm in a vehicle by members of a street gang. (Pen. Code, §§ 182, subd. (a)(1), 12031, subd. (a)(2)(C).) It was discovered after the fact that defendant and two of the other persons in his car had waived their Fourth Amendment rights pursuant to a probation condition. Although defendant Hester was an adult at the time, he was subject to a juvenile probation condition. The trial court denied the defendants' motion to suppress the gun. Defendant Hester pled guilty to the conspiracy charge and appealed.

HELD: The court of appeal, in a split, two-to-one decision, reversed. The majority opinion found the stop of the vehicle in which defendant was riding to have been made without reasonable suspicion. In analyzing the information the officers had upon making the stop, the court noted that a particularized suspicion that the occupants had committed, or were about to commit, a crime was needed for a lawful stop or detention. Even in light of the officers' expertise, the court noted that, in order to find such a particularized suspicion in this case, too many inferences and deductions had to be accepted as true. For instance, it had to be assumed that: (1) The three cars were traveling together; (2) everyone in defendant's vehicle were East Side Crips because they were riding with an East Side Crip; (3) everyone in the other two vehicles were East Side Crips because they were traveling with the defendant's vehicle; (4) the persons in the vehicles were aware of the earlier shooting; (5) they were expecting retaliation; and (6) they were armed because they were expecting retaliation. To allow the lawful stop of a vehicle merely because it contained four black males, even assuming some of these inferences and deductions might be true, does not take into account the need for a particularized suspicion. Using these assumptions to justify the stop of the car is "far too consistent with racial profiling to be constitutionally permissible." Secondly, the court noted that discovering, after the fact, that the subjects could have been lawfully stopped and searched based upon their probation conditions does not validate the stop when the existence of these conditions were not known by the officers at the time of the stop.

NOTE: The majority decision fails to consider the "totality of the circumstances" as required in a Fourth Amendment analysis of reasonable suspicion. While the majority opinion gives some lip-service to the officers'

gang expertise, it doesn't give a lot of weight to their opinions and conclusions in calculating the totality of the circumstances. The dissenting opinion, on the other hand, does give due weight to the officers' opinions. Using common sense (with or without any gang expertise), the facts demonstrate reasonable suspicion of criminal activity in that: (1) the three vehicles all appear to have up to four young Black males in each car (race being relevant because the gang is Black and not because the officers are engaging in "racial profiling"); (2) one of the occupants is known to be a gang member who is usually in the company of other gang members, (3) the cars were traveling in a tight formation at 12:30 at night; (4) hours after a prior gang shooting; (5) in the territory of one of the warring gangs. The second issue: requiring prior knowledge of a Fourth Amendment probation condition waiver in order to use it as legal justification for a detention and/or search, is the newly emerging rule.

NOTES:

People v. Hill

(2004) 118 Cal.App.4th 1344

SUBJECT: Fourth Waiver Searches; Belatedly Discovered Conditions

RULE: Erroneous information from a law enforcement source as to whether a suspect is on a *parole* as opposed to a *probation* Fourth wavier is irrelevant.

FACTS: Defendant and his girlfriend, Jamie Gregory, burglarized the residence of a friend of Gregory's. The tip off leading to defendant and Gregory as the suspects in the burglary was when Gregory, who the victim knew to be destitute, living with her boyfriend in their car and in need of money, called ahead to make sure the victim wasn't home. Problem is, she was. Defendant and Gregory broke in as soon as the victim left for church and stole personal property. Told that Gregory and defendant were the likely culprits, the police traced them to a local motel where they had checked into earlier, after selling off some of the victim's property. Gregory was contacted in the parking lot of the motel. She admitted to staying with defendant at the motel but declined to agree to a consensual search. Defendant came outside to talk to the officers. Although defendant was in fact on probation and subject to search and seizure conditions (i.e., on a "*Fourth Wavier*"), a radio check came back erroneously indicating that he was *not*. The officer therefore detained both defendant and Gregory and began the process for obtaining a telephonic search warrant. In the mean time, the police dispatcher radioed back and told the officer, again erroneously, that defendant was on "*parole*" (and was therefore subject to "*parole search and seizure conditions*.") It was later determined that the dispatcher was apparently misreading a Fourth Waiver printout. Relying upon this information, the search warrant idea was scrapped and the motel room was searched pursuant to what the officer believed was a parole Fourth waiver. Some of the victim's property was recovered from the motel room. After defendant's motion to suppress the evidence was denied, he was convicted by a jury of receiving stolen property (while being acquitted of the burglary by a very gullible jury). Defendant appealed, arguing that a belatedly discovered probation Fourth wavier is not grounds for validating a warrantees search. The First District Court of Appeal (Div. 3) upheld his conviction. However, the California Supreme Court remanded the case to the appellate court for reconsideration due to their intervening decision in *People v. Sanders* (2003) 31 Cal.4th 318.

HELD: The First District Court of Appeal again affirmed defendant's conviction. The California Supreme Court's decision in *Sanders* held that an adult parolee's Fourth wavier, when unknown to police officers at the time they conduct an otherwise illegal search, will *not* validate the legality of the search when the search and seizure condition is later discovered. The Court here, however, determined that *Sanders* is not controlling in these unique circumstances. Recognizing that the primary purpose of excluding illegally seized evidence is to deter law enforcement from conducting such searches, the officers in this case attempted to do everything legal. When it was first believed that defendant was not subject to any Fourth wavier, they started the process to obtain a search warrant. Then, when it was then believed that he was on a *parole Fourth wavier*, they halted the search warrant process and conducted the warrantees search accordingly. Although the information from the dispatcher was wrong, and although a searching officer will not be able to argue "good faith" when the error in the information he received was the fault of some law enforcement source, the fact is that defendant here was in fact subject to a Fourth Waiver. Suppressing the evidence where the only mistake is the nature of the Fourth wavier (i.e., probation vs. parole), and not the fact of whether he was, or was not, subject to a Fourth waiver, serves no deterrent purpose. The stolen property, therefore, was properly admitted into evidence against him.

NOTE: This only makes sense. The officer was all ready to do it legally with a search warrant when he was told that the defendant was in fact subject to a Fourth Wavier. What possible difference does it make what type of Fourth waiver was involved? It sure is good to see an appellate court use a little common sense. But then,

some prosecutors feel that all the courts expect from us is to act "*reasonably*." Can it really be argued that this officer didn't do just that?

NOTES:

People v. Bowers

(2003) 117 Cal.App 4th 1261

SUBJECT: Probation Search Clauses (Fourth Waivers)

RULE: A warrantless, illegal search of an adult may not be justified by a belatedly discovered probation search condition (i.e., a "Fourth Waiver").

FACTS: Several deputy sheriffs, including a supervising sergeant, were investigating a suspected "chop shop." As the supervising sergeant approached the house where the chop shop was located, he noticed another deputy contacting and speaking with the defendant. The defendant was standing about 10 feet away from the house. The sergeant could not remember what was said during the deputy's conversation with the defendant. The sergeant then heard some rumbling coming from the house. This caused the sergeant some concern and he asked the deputy to direct the defendant to move away from the house and toward the sergeant. The defendant came toward the sergeant who asked the defendant if he had any weapons in his possession and for permission to do a patsearch. The defendant raised his hands over his head in response. The sergeant conducted a patsearch and ultimately felt a hard cylindrical object. The sergeant asked about the object. The defendant said it was a "pipe." The sergeant then removed the pipe which he recognized as the type used for smoking illegal drugs. Defendant was arrested and a second search of his person revealed a couple of baggies of methamphetamine. Although the sergeant was unaware of it, the defendant had a probation search clause requiring him to submit to search and seizure at any time of day or night, with or without warrant, by any peace officer. At a motion to suppress, the px magistrate concluded that the existence of the search clause validated the search of defendant's person regardless of the deputies' lack of knowledge of his probationary status at the time and because there had been no showing the search was arbitrary, capricious, or harassing.

HELD: The court of appeal initially ruled the search could be justified by the probation clause but the California Supreme Court took up the case and then sent it back down to the court of appeal telling them to make their decision in light of *People v. Sanders* (2003) 31 Cal.4th 318. In *Sanders*, the California Supreme Court held that a belatedly discovered "parole" search and seizure condition did not save an otherwise illegal search of an apartment. The *Bowers* court of appeal, then extended the rationale used in *Sanders* to probation searches and found the search of defendant's person could not be legally justified by a belatedly discovered probation search clause. The court of appeal then sent the case back down to the trial court for the trial court to reconsider whether the detention and patdown of defendant could be justified based on reasons *other than* the probation search clause.

NOTE: This case is consistent with every other case coming down since *Sanders*, and all finding that belatedly discovered search and seizure conditions will not save an otherwise illegal search: *People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180; *People v. Lazalde* (2004) 120 Cal.App.4th 858; and *People v. Hester* (2004) 119 Cal.App.4th 376. Thus, with the possible exception of a juvenile probationer found on the street, just know that you won't be able to justify an otherwise illegal search on the basis that the guy was on a Fourth Waiver that you didn't know about at the time. That is, "luck out" searches have run out of luck.

NOTES:

United States v. Crawford

(9th Cir. 2004) 372 F.3d 1048

SUBJECT: Parole Searches

RULE: A confession obtained during a non-custodial interrogation, even though occurring after an illegal Fourth Waiver search, is admissible so long as the subject is legally subject to arrest and the interrogation occurs at a location other than at the site of the search.

FACTS: An FBI agent developed (what was later stipulated to be) probable cause to believe defendant committed a two-year-old San Diego bank robbery. When it was discovered that defendant was also on state parole, the agent determined that he would use defendant's waiver of his search and seizure rights (i.e., a "Fourth Waiver") to conduct a search of defendant's residence. Because the robbery was now two years old, and defendant had in the mean time changed residences, the agent did not expect to find any physical evidence connecting defendant to the robbery. However, the search was conducted anyway in order to provide the FBI agent with the opportunity to question defendant, hoping to obtain some incriminating statements about the robbery. As the search was being conducted, defendant was detained and briefly questioned. He denied any involvement in the robbery. The search turned up nothing. Defendant then agreed to accompany the agent to the local FBI office. Sitting in an interview room, defendant was told that he was not in custody and that he could leave at any time, but that the agent wished to read defendant his rights pursuant to *Miranda* anyway. Defendant interrupted the agent during the admonishment because it made him nervous. Giving up on the admonishment, and after reiterating that he was not under arrest and was free to leave, the agent questioned defendant further in an hour-long interview concerning his possible involvement in the bank robbery. Defendant eventually admitted to the robbery and to using a firearm. After the interview, defendant was driven home and released. He was later indicted by a federal grand jury. His motion to suppress his confession was denied by the trial court, ruling that the parole search was illegal (i.e., conducted without a reasonable suspicion), but that defendant's confession was sufficiently attenuated from the illegal search so as *not* to be fruit of the poisonous tree. Defendant pled guilty and appealed. Two judges of a three-judge panel of the Ninth Circuit Court of Appeals ruled that defendant's confession was *not* attenuated from the illegal search, and should have been suppressed. The alleged illegality of the parole search was based upon the court's conclusion that even when acting under the authority of a Fourth Waiver, such a search must be supported by at least reasonable suspicion of criminal wrongdoing. (See *United States v. Crawford* (9th Cir. 2003) 323 F.3d 700.) Here, there was no such reasonable suspicion. An en banc eleven-judge panel of the Ninth Circuit, however, granted a rehearing on the issue.

HELD: The en banc panel (with three dissenting justices) affirmed defendant's conviction. At the outset, the court specifically declined to decide whether the suspicionless parole search was illegal. Instead the court presumed that it was illegal for purposes of its analysis. Then, the court answered defendant's arguments one by one. First, the court recognized that, under *New York v. Harris* (1990) 495 U.S. 14, even if the entry (or search, in this case) of defendant's residence was illegal, a confession obtained after defendant has been removed to another location outside the house, so long as there is probable cause to arrest him, is admissible. This is because the confession in such circumstances is not obtained by exploiting the illegal entry (or search). Rather, it was the product of the *lawful arrest* (or detention, in this case) of the defendant, based upon preexisting probable cause. Here, the FBI had probable cause to arrest defendant prior to going to his residence to conduct the parole search. Thus, detaining defendant inside when there existed probable cause to arrest him, and then obtaining the contested statements from defendant only after defendant voluntarily went with them to the FBI office, does not require the suppression of the confession. Second, the court did not find defendant's statement to be the product of the presumed illegal search. Since the police found nothing during the parole

search, that search could not have caused defendant's confession. Since there was no causal connection between the search and defendant's confession, there is no cause to suppress defendant's statements on that theory. Third, defendant argued that he should have been read his full *Miranda* rights before being interrogated. The court held, however, that despite the fact that the interrogation took place in an FBI interview room, defendant was told a number of times that he was not in custody and that he was free to leave. Defendant also accompanied the agent to the interview voluntarily and was taken home after the interview. All of these factors demonstrated the lack of a custodial interrogation. A *Miranda* admonishment and waiver, therefore, were unnecessary. Fourth, the court held that the agent's use of defendant's parole status and pretext search as a ruse to provide the agent with the opportunity to question defendant did not cause his confession to be involuntary. Based upon the totality of the circumstances, defendant's confession was voluntary.

NOTE: Prior to this en banc decision, this Ninth Circuit case held that reasonable suspicion was a prerequisite to a Fourth Waiver search. Upon rehearing, however, the majority of the court declined to decide that issue, ruling that defendant's confession was admissible irrespective of the legality of the search. Justice Stephen Trott, joined by four other justices, argued in a concurring, yet minority opinion, that a suspicionless parole search, as a so-called "special needs search" (given the strong state interest in administering its parolees), *is* lawful. Although we can't argue a minority opinion as the law on this issue, California authority, which we *can* use, is in agreement. (See *People v. Reyes* (1998) 19 Cal.4th 743.) It should also be noted that the prior published *Crawford* decision, holding that a suspicionless Fourth Waiver search is illegal, is no longer citable authority. With the demise of the first *Crawford* decision, state law enforcement officers are now protected—at least by qualified immunity—from civil liability for conducting a suspicionless Fourth Waiver search. But we may not be done with *Crawford* yet. Crawford's attorneys have appealed to the U.S. Supreme Court. If the U.S. Supreme Court grants certiorari, we may get final resolution of this issue.

NOTES:

Maryland v. Pringle

(2003) 124 S.Ct. 795

SUBJECT: Vehicle Stops and Probable Cause to Arrest

RULE: Finding five baggies of cocaine and a rolled-up bundle of money in a vehicle is probable cause to arrest all the vehicle's occupants.

FACTS: A Baltimore County Police Officer stopped a Nissan Maxima for speeding at 3:16 a.m. Defendant was the right front seat passenger in the vehicle. Also present was the owner/driver and a third person in the back seat. When the driver opened the glove compartment to retrieve his registration, the officer saw in plain sight a roll of currency. After checking the vehicle's license for any outstanding warrants and giving the driver an oral warning about his speed, the officer asked the driver if he had any weapons or narcotics in the car. The driver said that he did not, and consented to allow the officer to search. $763 was recovered from the glove compartment. More importantly, the officer recovered five plastic glassine baggies containing cocaine from behind the back-seat armrest which had been pulled up flush with the back of the rear seat, concealing the contraband. No one agreed to admit to possession of the cocaine despite the officer's threat to arrest everyone unless someone was willing to throw himself on the proverbial sword. So all three subjects, including defendant, were arrested and transported to the police station. Defendant then, at the station, admitted to possessing the cocaine. Charged in state court, defendant brought a motion to suppress arguing that there was insufficient probable cause to arrest him, and that his confession, therefore, should have been suppressed as a product of that arrest. The trial judge denied his motion. After being convicted of possession with the intent to distribute the cocaine, defendant appealed. The Maryland Court of Appeals, in a split decision, reversed, finding that without some specific facts tending to show that defendant had knowledge and dominion or control over the cocaine, his arrest was illegal. The State of Maryland appealed to the United States Supreme Court.

HELD: In a unanimous decision, the United States Supreme Court reversed, thus reinstating defendant's conviction. In so doing, the Court "*reiterated*" that "*the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life in which reasonable and prudent men, not legal technicians, act*." It is really no more than "*a reasonable ground for belief of guilt*." In this case, when some $763 in a roll is located in the glove compartment immediately in front of the defendant, the cocaine is accessible to everyone in the car, and when no one is willing to admit to sole possession, probable cause existed to arrest the defendant and everyone else in the car. "We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine." Defendant's confession, therefore, was the product of a lawful arrest, and was properly admitted against him at trial.

NOTES:

Thornton v. United States

(2004) 124 S.Ct. 2127

SUBJECT: Searches Incident to Arrest; Near a Vehicle

RULE: The passenger area of the vehicle of an arrestee who was a recent occupant of that vehicle is subject to search incident to that arrest.

FACTS: Defendant, driving a Lincoln Town Car, slowed suddenly in an apparent attempt to avoid driving up next to a Virginia police officer. Finding this suspicious, the officer pulled over to allow defendant to pass him and conducted a radio check on the vehicle's license. The registration check came back to a Chevrolet. Before the officer was able to catch up and effect a traffic stop, defendant pulled into a parking lot, stopped, and got out of his car. The officer contacted defendant in close proximity to his car and asked for a driver's license. Defendant appeared nervous, was rambling and licking his lips, when the officer told him that the plates were registered to a different car. Defendant denied having any narcotics or weapons on him when he was asked and granted the officer permission to pat him down. Upon feeling a bulge in the defendant's pocket, the officer asked him again whether he had any illegal drugs on him. Defendant admitted that he did and produced some baggies containing marijuana and a "large amount" of crack cocaine. The officer arrested defendant and, incident to the arrest, searched his vehicle, finding a "BryCo .9-millimeter handgun" under the seat. Charged in federal court with a number of narcotics-related offenses and with being a felon in possession of a firearm (18 U.S.C. § 922(g)(1)), defendant's motion to suppress the gun was denied. After being convicted in a jury trial, defendant appealed. The Fourth Circuit Court of Appeal affirmed, finding that the search of the passenger area of defendant's car was lawful because defendant was in close proximity, both temporally and spatially. Defendant petitioned the United States Supreme Court.

HELD: The United States Supreme Court affirmed. *Chimel v. California* (1969) 395 U.S. 752, long ago established the search incident to arrest rule, allowing a police officer to search the person of an arrestee and the area immediately surrounding him despite the lack of any reason to believe there might be something in that area to seize. The rationale for this rule is based upon the need to remove any weapons the arrestee might seek to use to resist arrest or escape, and the need to prevent the concealment or destruction of evidence. *New York v. Belton* (1981) 453 U.S. 454, extended this rule to the passenger area of a vehicle when any of the vehicle's occupants is subjected to a custodial arrest. In *Belton*, the arresting officers removed defendant from his vehicle before effecting the arrest. The Court here found that whether the arrestee leaves the vehicle at the request of the officers, or on his own initiative, is not relevant. So long as the person being arrested is an occupant, or a "recent occupant," of the vehicle, the passenger area of the vehicle is subject to search incident to a lawful arrest of that person. "The arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle." The Court also noted that even though it is unlikely that defendant could have actually reached under the driver's seat for the gun in this case, the need for a "bright line," easy to follow, rule, justifies the decision.

NOTE: The Court further noted that some scholars feel that the real test is the close proximity, both temporally and spatially to the vehicle, so it can be said that the arrestee still has control over its contents. However, the Court declined to decide this issue in that close proximity was not the issue here, defendant having conceded that he was standing right next to his car. The Court instead stuck with the "recent occupant" language of *Belton*. This decision is also consistent with prior California case law. (See *People v. Stoffle* (1992) 1 Cal.App.4th 1671; *People v. Boissard* (1992) 5 Cal.App.4th 972.) Two of the seven affirmative votes preferred to uphold the search based upon the probable cause the officers had that more

cocaine would be found in his car, having found some on his person.

NOTES:

People v. Gonzalez

(2004) 116 Cal. App. 4th 1405

SUBJECT: Narcotics; False Compartments in a Vehicle

RULE: A false compartment in a vehicle, per H&S 11366.8, need not be an actual alteration to the vehicle. Possession of the false compartment may be proved through a "*constructive possession*" theory.

FACTS: Pittsburg (California) Police and Contra Costa County Sheriff's Department narcotics officers executed three search warrants in June, 2001. The first one was at defendant Gonzalez's apartment and resulted in recovery of a considerable amount of heroin and methamphetamine, along with money and paraphernalia indicative of a large-scale drug distribution organization. Just before the warrant was served, two Hispanic males were observed leaving defendant's apartment in a blue 1990 Ford Thunderbird which had been parked directly across the street. Defendant had been seen in this same vehicle some nine months earlier during a surveillance. A second warrant was served at the apartment of two other codefendants, the results of which are not relevant here. A third search warrant was executed at a nearby salvage yard where large quantities of heroin and methamphetamine were discovered, along with cutting agents and other narcotics paraphernalia. The next day, an officer returned to the salvage yard and observed two Hispanic males leave the business and get into the same blue Thunderbird seen at defendant's apartment the day before. This vehicle was subsequently stopped and its occupants arrested. One of the people arrested had defendant's telephone number on a card in his wallet. This person's cell phone also indicated that it had been used to call defendant a number of times over the last several days. The Thunderbird was searched. Two separate bundles of bills, totaling $15,000, were found in a "*dead space*" behind a speaker mounted on the left rear passenger door. A small amount of heroin was seized from inside the front driver's side air conditioning vent, hidden behind a paper bag. A toggle switch of the type that could be used to release an electric compartment had been added under the steering column, although it was not yet hooked up to anything. An expert officer later testified that the Thunderbird was equipped as a "*load car*," used to secret drugs or currency and to transport drugs from one location to another. Defendant and others were convicted of a bunch of drug-related offenses and conspiracy. Defendant was also convicted of possession of a false compartment, per H&S § 11366.8. Defendant appealed, arguing that their was no evidence that the Thunderbird had been modified to contain any such compartments as described in section 11366.8, and that there was insufficient evidence to connect him to the car in the first place.

HELD: The First District Court of Appeal (Div. 1) affirmed. As to what is a "*compartment*," for purposes of H&S § 11366.8, subdivision (d) defines the term as "any box, container, space, or enclosure that is intended for use or designed for use to conceal, hide, or otherwise prevent discovery of any controlled substance within or attached to a vehicle, *including*, *but not limited to*, any of the following: . . ." (Italics added) The subdivision then goes on to describe various "modifications, fabrications or alternations" to a motor vehicle, done to create a compartment that can be used to secret drugs. Defendant argued that there was no evidence of any such alterations to the Thunderbird, and therefore it had not been proven that the car had any illegal "compartments." The Court, however, noted that the language of the statute referred to a compartment that "*include*(*s*), *but* (*is*) *not limited to*" the described alterations; such language broadening the list of what might be considered to be an illegal "compartment" to just about anywhere in the vehicle, *whether specifically altered for that purpose or not*, that could be used to secret drugs. The sole exception would be any areas designed or intended by the vehicle's manufacturer for storage or transportation of personal items. The places where drugs and money were found in the Thunderbird, although not elaborate, qualified under the statute. As to defendant's "*possession*" of the Thunderbird and false compartments, the

Court noted that a finding of "*constructive possession*" is sufficient to sustain his conviction. "*Constructive possession*" is when a person maintains some control of, or a right to control, an object that is in the actual possession of another, or when his dominion and control over the object are exercised through the acts of an agent. In this case, there was sufficient evidence that defendant was a knowing "*aider and abettor*" in the drug trafficking enterprise, and that the Thunderbird was being used as a "*load car*" in that enterprise. Defendant had been seen in that car some months earlier; it was seen at his residence the day of the search; and the car's occupants had telephonic contact with defendant during the relevant times. This was enough evidence to support a finding that the defendant had "*constructive possession*" of the vehicle and its false compartments.

NOTES:

Illinois v. Lidster

(2004) 124 S.Ct. 885

SUBJECT: Highway Checkpoints

RULE: A roadblock set up to gain information from witnesses about a recently committed serious crime does not violate the Fourth Amendment if done in a manner so that persons are only detained for a short period of time and in a way that is reasonably likely to locate witnesses.

FACTS: Police set up a highway checkpoint designed to obtain information about a fatal hit and run accident that occurred the previous week. The checkpoint was set up on the same highway near where the accident took place and at the same time of night as when the accident occurred. The delay caused by the stop was only a few minutes and only involved 10-15 seconds contact with the police -who simply requested information and handed out a flyer. The defendant drove his vehicle toward the checkpoint but as he approached, he swerved, nearly hitting one of the officers. The officer smelled alcohol on defendant's breath and directed him to a side street where another officer ultimately arrested defendant after giving him a sobriety test. The defendant challenged the stop on the ground the checkpoint was unconstitutional.

HELD: The United States Supreme Court upheld the checkpoint as constitutional, finding that special law enforcement concerns will sometimes justify highway stops without individualized suspicion. Seeking information from potential witnesses in order to solve a crime is a special law enforcement concern which, like certain other forms of police activity such as crowd control or public safety, do not lend themselves to a reasonable suspicion or probable cause analysis. Instead, whether such a stop will found in violation of the Fourth Amendment depends on whether the police conduct is "reasonable." In determining whether the police conduct is reasonable, "courts look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Here, the public concern was grave (the police were investigating a crime resulting in death), the stop significantly advanced the public interest (the checkpoint was tailored to fit the investigative needs), and the stop interfered only minimally with the liberty of the persons stopped (the stops were brief, involved a simple request for information and distribution of a flier, provided little reason for anxiety or alarm, and were not done in a discriminatory or otherwise unlawful manner).

NOTE: The Supreme Court noted that other cases have also upheld "special needs" type checkpoints such as sobriety checkpoints (*Michigan Dept. of State Police v. Sitz* (1990) 496 U.S. 444 and border patrol checkpoints (*United States v. Martinez-Fuerte* (1976) 428 U.S. 543) and distinguished these types of checkpoints from the kind condemned in *Indianapolis v. Edmond* (2002) 531 U.S. 32 which involved the stopping of vehicles in order to look for evidence of drug crimes committed by the vehicle's occupants.

NOTES:

People v. Wilson

(2003) 114 Cal.App.4th 953

SUBJECT: DUI Cases; The PAS Test's Effects on a Later Blood Test

RULE: A DUI suspect voluntarily submitting to a PAS test must still submit to a later, post-arrest blood or breath test. Requiring the suspect to do so does not violate the Fourth Amendment.

FACTS: Defendant was involved in a traffic accident, seriously injuring himself and two people in the car he hit. The first police officer on the scene believed defendant was under the influence of alcohol, noting that defendant's eyes were "quite red, watery and bloodshot." However, due to defendant's own injuries, necessitating his transportation to a hospital, the officer could not immediately administer a field sobriety test. Later, at the hospital, the officer conducted a nystagmus test, whereby defendant was asked to follow the officer's finger as it was moved back and forth in front of his face. The defendant's difficulty in following the officer's finger was indicative of being under the influence. The officer then asked defendant to submit to a PAS ("Preliminary Alcohol Screening") test, advising him that such a test was (1) voluntary and (2) did not satisfy the requirement that he also submit to a blood or breath test should he be arrested. Defendant complied, and blew a 0.09% blood/alcohol level on the PAS device. Based upon this, the officer arrested the defendant and told him that he was required to provide a blood sample. Defendant refused. When told that he did not have a choice, defendant submitted under protest. The blood test resulted in a finding of a 0.12% blood/alcohol level. Charged with a whole host of DUI-related charges and allegations (e.g., Veh. Code, § 23153, subds. (a) & (b), plus some prior strike and serious convictions), defendant filed a motion to suppress the blood test result, arguing that submitting to a PAS test (1) satisfied his statutory obligation to provide a blood sample and (2) eliminated any exigency which would have justified the taking of a blood sample without a search warrant (a Fourth Amendment issue). The trial court denied his motion. A jury convicted defendant and he was sentenced to prison for 22 years. Defendant appealed.

HELD: The Court of Appeal affirmed defendant's conviction. First, Vehicle Code section 23612, subdivision (h), provides that a PAS test may be used as an investigative tool in determining whether "reasonable cause" (i.e., probable cause) exists, justifying an arrest for driving while under the influence. Subdivision (I) further provides that a subject must be told that taking a PAS test does not satisfy the person's obligation to take a blood, breath, or urine test. The arresting officer in this case complied with the requirements of this statute. Secondly, the PAS test results are not always admissible in court, admissibility being dependent upon proof of a number of foundational elements that may not always be available. This sometimes leads to the exclusion of such evidence in a later trial. (See *People v. Williams* (2002) 28 Cal.4th 408; *People v. Bury* (1996) 41 Cal.App.4th 1194.) If the taking of a PAS test eliminates an arresting officer's right to require the more sophisticated blood or breath test, the prosecution may be left with no evidence of a defendant's blood/alcohol level. The Legislature, by providing that taking a PAS test does not relieve a DUI suspect of the legal obligation to also take a blood or breath test, impliedly found the blood or breath tests to be more reliable. Thirdly, case law finding that, after obtaining a urine sample, the arresting officer may not require the suspect to also submit to a warrantless blood test because an exigency no longer exists (See *People v. Fiscalini* (1991) 228 Cal.App.3rd 1639), does not apply to the use of a PAS device. "The exigency created by the evanescent nature of blood alcohol and the danger that important evidence would disappear" justifies the warrantless taking of a blood or urine sample and analyzing it by a procedure that is presumed to be more reliable than a PAS test. Therefore, submitting to a PAS test neither eliminates the statutory obligation to take, nor affects the constitutional necessity of submitting to, a warrantless blood or breath test following the subject's arrest.

NOTES:

People v. Wells

(2004) 122 Cal.App.4th 155

SUBJECT: Anonymous Information in a Traffic Stop Situation

RULE: Anonymous information concerning a possible drunk driver *may* supply sufficient cause on which to base a traffic stop when it is detailed and contemporaneous.

FACTS: A California Highway Patrol Officer received a radio call at 1:43 a.m. concerning a possible under-the-influence driver weaving all over the roadway. A specific vehicle description was included; an 80's model blue van. According to the dispatcher, the van was northbound on Highway 99 at a particular cross street. The person reporting this information to the CHP dispatcher did so anonymously. The officer positioned himself about 2 to 3 miles north of that location. Two to three minutes later, the officer observed the van heading northbound, as predicted. Although the van did not weave, speed or otherwise violate any traffic rules, the officer stopped it anyway to check the driver's condition. Defendant, the driver, was arrested for driving while under the influence and possession of heroin. Her motion to suppress the evidence was denied by the trial court. Defendant pled no contest and appealed.

HELD: The Fifth District Court of Appeal affirmed. A law enforcement officer only needs a *reasonable suspicion* to justify a traffic stop for the purpose of investigating whether the driver is driving while under the influence of alcohol and/or a controlled substance. However, the rule is that anonymous information, absent corroboration, is generally insufficient to establish the necessary reasonable suspicion. The fact the anonymous tipster is able to describe easily observable facts, such as the physical description of a suspect, is *not* sufficient corroborate the otherwise anonymous information. The Court here, however, chose to adopt the reasoning of a number of out-of-state courts which, in cases of suspected driving under the influence, have held that law enforcement officers may pull over a vehicle for an investigatory stop based on a contemporaneous tip of erratic driving that accurately described a given vehicle, even where the officer did not personally witness any moving violations. The reliability of such information (thus supplying the necessary *reasonable suspicion*) is supplied by a detailed and accurate physical description of the vehicle as well as its location and direction of travel, just minutes before it being observed by a police officer where predicted. A stronger governmental interest in stopping the vehicle is generally demonstrated by the dangerousness of a drunk driver on the road, thus allowing for a laxer standard of reliability. Lastly, the privacy interests in a vehicle stop is slight as compared to being subjected to a pat-down search on the public street. Based upon these guidelines, the officer in this case was justified in stopping defendant to check whether she was indeed under the influence.

NOTE: The Court here really stretched to find an exception to Supreme Court authority (*Florida v. J.L.* (2000) 529 U.S. 266.) dictating that uncorroborated anonymous information is insufficient cause to detain and pat down a suspect reported to be carrying a firearm. (See also *People v. Jordan* (2004) 121 Cal.App.4th 544; *The reasoning of this Court for a different rule*: A DUI suspect is more dangerous than a suspect standing on a street corner carrying a firearm. Not to diminish the dangerousness of a DUI on the road, some prosecutors have a hard time accepting the idea that he or she is more dangerous than someone illegally packing a pistol, although this reasoning has been used in federal courts as well. (See *United States v. Wheat* (8th Cir. 2001) 278 F.3rd 722.) The Court here also, by the way, talks about ways for police dispatchers to help pull these cases out of the anonymous tipster category, despite the reluctance of a caller to give his or her name. For instance, (1) press the caller for his identity, (2) make a record of tips from multiple sources concerning a single event, (3) note the source of the call, such as from a cell phone on the road somewhere, as opposed to a pay phone or home phone, (4) note the fact that 911 calls are recorded (and to save the recording), and (5) note whether

caller ID or some other mechanism enables authorities to identify the informant. The more detail the dispatcher can collect about the circumstances of the call, the less reluctance a court will have in finding the call sufficiently corroborated.

NOTES:

United States v. Terry-Crespo

(9th Cir. 2004) 356 F.3d 1170

SUBJECT: 911 Calls and Near-Anonymous Information

RULE: A 911 call from a victim of a recent, serious crime, despite the victim's apparent reluctance to identify himself, is sufficient to justify a detention and pat down of the suspect.

FACTS: A man called the 911 emergency number for the Portland, Oregon, Police Bureau and reported that he had just, within the last three minutes, been threatened with a .45 caliber handgun. The man provided a detailed physical and clothing description ("*like a gang member*") of the suspect, and the area of the assault. When questioned by the 911 operator, the man identified himself as "Jos Domingis" (as opposed to the more common spelling; "*Dominguez*"). In response to further questioning, Domingis said that he did not know the phone number from where he was calling in that he was using someone else's cell phone. When asked where the police could reach him, Domingis ignored the question and continued to talk about the assault. The 911 operator finally asked him where he was at that moment. Domingis gave the names of two streets that did not intersect, and then added; "*I don't want . . . I don't want . . . I don't want . . . .*" It appeared to the operator that Domingis did not want to make police contact. Patrol officers responded to the area. Minutes later, Domingis called back to report that the suspect was in the parking lot of a particular motel, and, although claiming to be almost a mile and a half away, described the scene as officers spotted defendant and made contact. (It is apparent that "Domingis" was never heard from again, nor identified.) Based upon the information from the first call, Portland Police Bureau Officer Kulp contacted defendant in the parking lot of the motel as Domingis was describing it to the 911 operator. Defendant was detained at gunpoint, handcuffed and patted down for weapons, resulting in the recovery of a fully loaded .45 caliber semi-automatic pistol. Charged in federal court with being a convicted felon in possession of a firearm (18 U.S.C. § 922(g)), defendant's motion to suppress the gun was denied. He pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeal affirmed, rejecting defendant's argument that the rule of *Florida v. J.L.* (2000) 529 U.S. 266, dictates the conclusion that defendant was unlawfully detained and patted down. In *J.L.*, officers, acting on an anonymous tip, contacted and patted J.L. down for weapons. The U.S. Supreme Court in *J.L.* reiterated the long-standing rule that anonymous information, without corroboration, is insufficient "*reasonable suspicion*" to stop, detain and frisk a subject. In this case, however, the information from "Domingis" was not completely anonymous, nor totally uncorroborated. First, the caller, who was obviously a Latin male for whom English was his second language, did in fact identify himself. Although it is possible that the caller used a fake name, it is just as likely that he was merely having difficult expressing himself in English. And the fact that the call was tape-recorded in this case (as opposed to what occurred in *Florida v. J.L.*) makes it less of an anonymous call. Secondly, the call having come in on the 911 emergency line describing a serious crime within minutes of its occurrence, and not just information about "*general criminality*," adds some reliability to the information provided to the police. Third, by calling 911, giving a name (whether it was right or wrong) and general location under circumstances where the caller might believe that his call could be traced, places the caller's anonymity at risk. And lastly, additional reliability is added by the fact that the call dealt with firsthand information from a crime victim laboring under the stress of the recent excitement. All of this together was sufficient to give the information from Mr. Domingis an "*indicia of reliability*," sufficient to warrant the detention and pat down of the defendant. Recovery of the gun, therefore, was lawful.

NOTE: While some prosecutors agree that the circumstances of this case were sufficient to give the responding officers the necessary "*reasonable suspicion*" that the defendant might be armed, it really appeared that the Court was having a difficult time differentiating this case from *Florida v. J.L.* The contemporaneous nature of

the call alone, from a crime victim, describing a serious crime that had just occurred, should be sufficient to justify a detention and patdown. But either way, particularly when you consider that this decision came out of the mouth, so to speak, of the Ninth Circuit Court of Appeal, this case should serve as a significant limitation of the rule of *Florida v. J.L.* in future cases. Now, we can say with a straight face that anonymous information *plus very little else* is sufficient cause to detain and, if weapons are involved, pat the suspect down. It's a good one to remember and cite often when the issue of anonymous tips comes up.

NOTES:

People v. Jordan

(2004) 121 Cal.App.4th 544

SUBJECT: Searches Based on Belatedly Discovered Search Conditions: Anonymous Information

RULE: (1) A belatedly discovered search condition will not make an otherwise illegal search lawful. (2) Anonymous information without corroboration is legally insufficient to justify a detention and a patdown for weapons.

FACTS: Bakersfield police officers received a radio call concerning a man with a gun in a park. Specifically, the dispatcher told responding officers that there was a subject carrying a concealed weapon at a specific location, and that the subject was a black male in his 30's wearing a black jacket, white shirt, tan pants and red boots. It was also noted that the suspect was carrying a concealed handgun in his right front coat pocket. This was all based upon a telephone call to the police department from a person who declined to identify himself. Responding officers, arriving within one minute of receiving the call, found defendant sitting on a park bench. He matched the physical description as broadcast. Defendant was observed for about 30 to 45 seconds doing nothing suspicious. No bulge in defendant's clothing could be seen. Finally, defendant was ordered to put his hands over his head and back up to the officer. When asked if he had any firearms on him, defendant did not answer. The officer took physical hold of defendant's hands and patted him down for weapons. A loaded and functional semi-automatic pistol was found in defendant's jacket pocket, just as predicted. When later questioned, defendant claimed he obtained the gun from someone named John. After defendant's arrest, it was discovered that he was on parole. Charged with being a felon in possession of a firearm, defendant's motion to suppress the gun and his statements was denied. Defendant was convicted after a jury trial, getting 25-years-to-life as a third striker, and appealed.

HELD: The Fifth District Court of Appeal reversed, finding the detention and patdown of the defendant to be illegal. First, the Court rejected the Attorney General's argument that defendant, as a parolee, was subject to search based upon his Fourth Waiver even though the officers did not know at the time that he was a parolee. Courts are now consistently holding that a belatedly discovered search and seizure condition, including that of a parolee, will not save an otherwise illegal search. (See *People v. Sanders* (2003) 31 Cal.4th 318.) It matters not whether the search is of a residence (e.g., as in *Sanders*) or of a pedestrian on the street (e.g., *People v. Bowers* (2003) 117 Cal.App.4th 1261). Secondly, on the issue of the reliability of the tipster's information, the rule is that absent some corroboration reflecting either the informant's inside information or his ability to predict future behavior, such information is not legally sufficient to justify a detention or a patdown for weapons. (*Florida v. J.L.* (2000) 529 U.S. 266.) Other than knowing that the pistol was in a particular pocket, the informant in this case provided no such inside or predictive information. Also, the quick confirmation of the physical description of the defendant and his location, by itself, is legally insufficient. And lastly, as dictated by the Supreme Court in *Florida v. J.L.*, there is no such thing as a *public safety exception* for firearms, despite the danger posed by allowing a possibly armed suspect to walk about freely in a public park with other people in the area. There being no means by which to identify this particular informant (i.e., his voice not being familiar and having failed to provide any other clue as to his identity), his information was legally insufficient to justify the defendant's detention or patdown.

NOTE: This was not a real surprise. The rule has been for a long time that anonymous information alone, without some sort of corroboration or other means of verifying the reliability of the informant's information, does not amount to a *reasonable suspicion*. Unfortunately, it really puts the responding officers at a serious disadvantage, not being able to legally pat him down for weapons but at the same time knowing that he might very well be a danger to the officers and everyone else within his line of fire.

NOTES:

People v. Lopez

(2004) 119 Cal.App.4th 132

SUBJECT: Frisks for Weapons

RULE: The patdown of a belligerent, uncooperative person, reported by a witness to be possibly in possession of a firearm, is lawful under the facts of this case.

FACTS: Police received a call concerning Hispanic males in a park with a handgun. Responding officers contacted the complainant who pointed out defendant and two others at a nearby jetty. One of the officers walked toward the three men. Seeing the officer coming, the three men huddled, and then defendant split away from the other two and walked toward the approaching officer. The officer asked for his name. Defendant impolitely declined to identify himself, instead suggesting to the officer that, in effect, he perform a physically impossible sexual act with himself. Undeterred, the officer told defendant that he was there investigating a report of a person with a gun, informing him that he was going to pat him down for weapons. Defendant again expressed himself in a series of four-letter expletives, telling the officer that no one was going to pat him down. During this discussion, defendant, who was wearing baggy pants, kept reaching for the front of his pants in which there appeared to be a large heavy object. When defendant resisted the officer's attempts to frisk him, he was arrested, handcuffed, and put into the back seat of a patrol car. As this was done, a first attempt at a patdown search failed to locate any weapons. Subsequently, a .32 caliber handgun wrapped in a bandanna was found at the jetty where defendant had been seen with the other two men. Remembering that defendant kept reaching for his front pants pockets, the officer felt that he might still be armed. Defendant was therefore pulled from the patrol car and patted down a second time. This time, a loaded Makarov nine-millimeter handgun, fully loaded with eight rounds including one in the chamber, and with the safety off, was found in his front pants pocket. Charged with various weapons offenses, defendant's motion to suppress the gun and ammunition was denied. He was subsequently convicted and appealed.

HELD: The Second District Court of Appeals (Div. 6) affirmed. The Court had no difficulty in determining that the officer had a right to pat him down for weapons. In order to lawfully detain and frisk a person, a police officer need only have a "*reason to believe*" (i.e., a "*reasonable suspicion*" that) the subject detained is armed with a weapon. Although the complainant could not tell which of the three Hispanic males had the firearm, such a weapon could have easily been handed off to any of the three subjects. Defendant's belligerent attitude and his insistence upon reaching into an area of his baggy pants where there appeared to be a large heavy object supplied more than enough reasonable suspicion to believe that he might be armed. Defendant's refusal to submit to a frisk for weapons constituted probable cause to arrest him for delaying the officer in the performance of his duties. (P.C. §148(a)(1)). Once lawfully arrested, defendant was subject to a full search incident to that arrest. Recovery of the gun, therefore, was lawful.

NOTE: This was not even a close case. The Court even noted that the officer had no other choice, and that had he failed to attempt a protective patdown, he would have been "derelict" in his duty to protect himself and others. Unfortunately, the Court uses as the legal test for a patdown the necessity of a "*reason to believe*" the subject may be armed. Other Courts, in other contexts, have likened a "*reason to believe*" to "*probable cause*," some prosecutors would have preferred that they use the more traditional test for a lawful patdown; a "*reasonable or rational suspicion*" that the person may be armed. But don't get so hung up in the verbiage that you err on the side of *not* patting a person down for weapons when it might otherwise be called for. If, under the circumstances, you are in fact in fear for your safety, a patdown for weapons can almost always be lawfully justified. Your gut, or self-protective instinct, is probably your best guide in these situations.

NOTES:

Hiibel v. Sixth Judicial Dist. Court of Nevada

(2004) 124 S.Ct. 2451

SUBJECT: Detentions and the Need to Identify Oneself

RULE: State laws requiring a lawfully detained suspect to identify himself under penalty of arrest violates neither the Fourth nor the Fifth Amendments.

FACTS: A Humboldt County, Nevada, deputy sheriff responded to a call concerning a possible assault. The caller reported seeing a man assaulting a woman in a red and silver GMC truck on a particular road. The deputy found the described vehicle with a woman sitting inside. Defendant, who appeared to be intoxicated, was standing in the road. Skid marks led up to the truck indicating to the deputy that the truck had skidded to a stop. The deputy contacted defendant and explained to him that he was checking a report of a fight. When asked for some form of identification, defendant refused. After eleven attempts to get defendant to identify himself, followed by a warning that he would be arrested if he failed to comply, the deputy finally placed the still-noncompliant defendant under arrest for resisting, delaying or obstructing a public officer in violation of a Nevada law similar to Penal Code section 148. The basis for defendant's violation was his failure to identify himself in violation of a Nevada statute that requires a lawfully detained suspect to identify himself. Defendant was convicted and appealed. His conviction was upheld through the state appellate court system. The United States Supreme Court granted certiorari.

HELD: The United States Supreme Court affirmed his conviction. The Court first rejected defendant's argument that his arrest violated the Fourth Amendment. A police officer's need to identify subjects who are potentially involved in some criminal violation (i.e., during a lawful detention) outweighs a defendant's perceived right not to cooperate with the officer. A police officer needs to know in such a situation who he or she is dealing with; i.e., someone with a history of violence, mental illness, or who is wanted for another offense. In this case, a state statute required defendant, as a person who was lawfully detained, to identify himself. Such a statutory requirement does not violate any Fourth Amendment constitutional principles. The Court next rejected defendant's argument that requiring him to identify himself violated his Fifth Amendment right against self-incrimination. Recognizing that there may be instances when identifying oneself could provide a link to some other criminal behavior on the part of a detained person, thus implicating the Fifth Amendment, merely being required to identify himself during an investigation of a potential domestic violence situation is not one of those instances. Under the facts of this case, being forced to identify himself did not put into issue defendant's Fifth Amendment right against self-incrimination.

NOTE: There is a debate among commentators as to whether this case gives California peace officers authority to arrest a lawfully detained person who refuses to identify himself. Be aware that, unlike Nevada, California has no specific statute that requires lawfully detained persons to identify themselves.

NOTES:

People v. Jenkins

(2004) 119 Cal.App.4th 368

SUBJECT: Consensual Encounters (Knock and Talks**)**

RULE: "Knock and Talks" are lawful, so long as conducted under circumstances where a reasonable person would have felt like they did not have to submit.

FACTS: Police officers knocked on the defendant's motel room door during daytime hours. Defendant peeked through the drapes and opened the door 30 seconds later. One of the officers asked the defendant if she was Lynn Jenkins. The defendant confirmed her identity. The officer then asked if she was on parole. The defendant said she was not. The officer asked to see the defendant's license. The defendant left the door open and went to retrieve her license. While the defendant searched for her license, the officer asked if she was the only person in the room. The defendant stated she was. The officer then asked if he could search her room for additional subjects for "officer's safety." The defendant consented. The officers entered. The defendant gave them her driver's license. At some point the officers told the defendant to sit down. One of the officers noticed some methamphetamine on a desk as he checked the bathroom. The officer then asked for consent to search the remainder of the room and defendant agreed. More methamphetamine was discovered inside a printer sitting on the desk.

The trial judge suppressed the evidence, ruling that in order to conduct a "knock and talk" contact with a person at a person's residence (which would include a motel room), as opposed to conducting a simple "consensual encounter" in a public place, the officers needed a "reasonable suspicion" of criminal activity.

HELD: There is no requirement that police officers have reasonable suspicion of criminal activity before they can knock on someone's door during daytime hours to ask questions or even to ask for consent to search. The court held the proper inquiry was to determine whether the consent to entry was voluntary; that is, "whether the officers' conduct would have communicated to a reasonable person that he or she was not free to decline their requests to enter and search the motel room or otherwise terminate the encounter." The court sent the case back down to the trial court in order to make factual findings bearing on the proper inquiry.

NOTE: Although the contact in *Jenkins* took place during the daytime; the court noted its approval of another Ninth Circuit case finding a "knock and talk" that took place during the *evening* hours to be constitutional in the absence of reasonable suspicion: *United States v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109. On the other hand, the court also discussed a federal case involving a knock and talk procedure which was found improper: *United States v. Jerez* (7th Cir. 1997) 108 F.3d 684. In *Jerez*, an officer knocked on defendant's motel room in the middle of the night. The officer persistently knocked on the door for three minutes and commanded the occupants to open the door. The *Jerez* court held that a seizure had taken place and noted that "the deputies' persistence, in the face of the refusal to admit, transformed what began as an attempt to engage in a consensual encounter into an investigatory stop."

NOTES:

People v. Colt

(2004) 118 Cal.App.4th 1404

SUBJECT: Consensual Encounters (Knock and Talks); Illegal Ruses

RULE: "Knock and Talks" are permissible without reasonable suspicion and concealing oneself from view after knocking until the suspect steps outside doesn't constitute an illegal ruse

FACTS: At 2:30 in the morning, an officer walked up to defendant's motel room and knocked on the door. For the purposes of officer safety, he moved to the left of the door; two other officers stood to the right of the door so they could not be seen. The defendant opened the door and quickly walked outside about 20 feet, looking left to right. The officer (who was familiar with defendant) then walked up to the defendant and greeted him. The officer spoke with the defendant, in a pleasant manner, for approximately two minutes about personal matters. The officer observed symptoms of defendant being under the influence of a stimulant. Defendant was then arrested and searched. Among other things, defendant had 21.8 grams of methamphetamine on his person. A search warrant was then obtained for the room and additional contraband was located. The defendant challenged the search on grounds the knock and talk procedure was illegal and the fact the officer concealed himself rendered the police conduct an illegal ruse.

HELD: An officer may lawfully knock on a suspect's door to seek an interview at home and seek an interview "as long as such inquiry is courteously made and not accompanied by the right to enter or secure answers." An officer does not lose this right by momentarily concealing himself to first determine if the suspect would peacefully answer the knock on the door. The encounter with defendant was consensual. The court noted that the officers did not draw their weapons, surround the defendant or stand between defendant and the room door. Nor did the officers tell defendant he was not free to leave. Some cases have disapproved of the use of a ruse or deception to lure a defendant outside his residence. However, hiding behind the door was not an illegal ruse to gain visual entry into the residence. It is not required that the officers identify themselves as a precondition to finding that a defendant voluntarily left his abode. Even if a simple knock on a door and concealing oneself can be equated with a ruse or deception, such a tactic does not implicate Fourth Amendment protections

NOTE: It is a good idea to contrast *Colt* with two cases which have disapproved "ruses" to lure suspects outside are *People v. Reeves* (1964) 61 Cal.2d 268 and *People v. Reyes* (2000) 83 Cal.App.4th 7. In *Reeves*, police suspected defendant of selling narcotics at a hotel. The officer had the hotel manager call the defendant and say a registered letter was at the front desk. When defendant opened the door, officers peeked inside and saw a marijuana cigarette. The *Reeves* court held the "visual entry" unlawful because "an entry obtained by trickery, stealth or subterfuge renders a search and seizure invalid." In *Reyes*, the court held a consent to search was invalid where a defendant was induced to leave a residence by a plainclothes officer who falsely reported he had hit defendant's truck and where, once outside, the defendant was confronted by several officers in raid gear and peppered with questions leading to his consenting to a search of his person. The *Reyes* court found it was improper for an officer to lure someone outside of a residence where the officer has no reasonable suspicion the person is involved in illegal activity and the person is induced to leave the residence in order to engage in lawful activity - although the court noted it would be permissible for a police officer to lure someone outside of a residence when the person is induced to leave the residence in order engage in unlawful activity.

NOTES:

United States v. Banks

(2003) 124 S.Ct. 521

SUBJECT: Knock and Announce; Waiting A Reasonable Time

RULE: A forced entry after only a 15 to 20 second wait does not violate the Fourth Amendment (nor the federal knock and announce statute) when the exigency is the possibility that drugs may be destroyed.

FACTS: North Las Vegas Police and FBI agents developed information that defendant was selling cocaine from his home. With a search warrant in hand, officers and agents surrounded his two-bedroom apartment at about 2:00 in the afternoon. Officers at the front door called out *Police with a warrant*, and rapped on his door loud enough for other officers at the rear to hear it. After 15 to 20 seconds of no response, a battering ram was used on the door. As officers entered the apartment, defendant came out of the bathroom where he had been taking a shower, and from where he claimed he heard nothing until the door was splintered. Weapons, crack cocaine and other evidence of drug dealing was recovered. Charged in federal court, defendant's motion to suppress the evidence, alleging a violation of the *Knock and announce* (known locally as *Knock and notice*) requirements of 18 U.S.C. '3109 and the Fourth Amendment, was denied. Defendant pled guilty and appealed. The Ninth Circuit Court of Appeal, in a split two-to-one decision, reversed. Applying a number of factors to consider in evaluating compliance with the knock and announce requirements, the majority of the court found that a forced entry into a residence after waiting only 15 to 20 seconds, at least under circumstances where there is no explicit refusal to enter, and in the absence of any *exigent circumstances*, is illegal. The Government appealed.

HELD: The United States Supreme Court, in a unanimous decision, reversed the Ninth Circuit, finding the entry to be lawful. The Court first noted that under the Fourth Amendment, the requirement that officers comply with *Knock and announce* is the general rule. However, that obligation gives way when officers >have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or . . . would inhibit the effective investigation of crime by, for example, allowing the destruction of evidence.' The *reasonable suspicion* necessary to excuse compliance with the knock and announce requirement may exist at the time the warrant is applied for, thus giving the magistrate the authority to approve a no-knock warrant, or may develop later at the scene and at the time of the proposed entry and search. In either case, in determining when the requirements for an exception to the knock and announce rule applies, no *Bright line* can be drawn, and no specific categories should be created. The test is always one of *reasonableness*, based upon a consideration of all the surrounding circumstances reasonably apparent to the officers at the time. The fact that the occupant might be taking a shower, absent some reason for the officers to know that, is irrelevant. Also, the fact that damage to property might occur, although relevant to the overall reasonableness determination, does not call for a heightened exigency determination. As to the reasonableness of waiting only 15 to 20 seconds, the type of exigency applicable to the situation must be considered. If the officers were claiming that they believed that defendant was refusing them entry, then the time it would reasonably take to get to the door would be the relevant inquiry. But here, the belief was that the defendant might be destroying evidence; something that, in a narcotics case, could be accomplished in much less time than it would take for a person to get to the door. As such, the relevant inquiry is how long it would take an occupant to destroy his cocaine; something that could easily be accomplished within 15 to 20 seconds. Once the exigency had matured, . . . the officers were not bound to learn anything more or wait any longer before going in, even though their entry entailed some harm to the building. Thus, under the circumstances of this case, given what the officers reasonably knew at the time they forced entry, neither the Fourth Amendment nor 18 U.S.C. ' 3109 were violated.

NOTE: In reaching this decision, the Court severely chastised the Ninth Circuit for its propensity to create checklists of factors, or categories, and testing the reasonableness of every case upon these same checklists.

A number of recent cases were cited in this decision where the Supreme Court has dumped on the Ninth Circuit for doing just that. In tying their criticism to the facts of this case, the Court noted that the Ninth Circuit's standard method of factor-oriented analysis ignores case-specific differences, such as a criminal suspect's ability to rapidly dispose of cocaine rocks as opposed to pianos. In short, some prosecutors read this case as one more instance of the Supreme Court trying to shame the Ninth Circuit into getting rid of its over-structured checklists, take a step back, and objectively look at *all* the surrounding circumstances of the particular case under consideration. Then, and only then, is an appellate court to ask itself; *Does this, in its totality, feel good*? If so, it is reasonable, and lawful. If not, then *reverse away*! This is what you, as law enforcement officers, must do as well. Exercising your innate common sense, tempered by a thorough knowledge of the case law, ask yourself when you are about to take some action having constitutional implications; Would the prosecutor *feel comfortable with what I'm about to do*? If so, the likelihood that a later reviewing court will uphold your actions is significantly increased. If not, stop, take a deep breath, and call your hardworking, always-available, happy-to-help, D.A. Liaison for advice.

NOTES:

United States v. Peterson

(9th Cir. 2003) 353 F.3d 1045

SUBJECT: Knock and Notice

RULE: The failure to comply with constitutional "*knock and notice*" requirements is excused when an occupant tries to slam the door in the officer's face.

FACTS: Defendant was engaged in an identity theft operation; stealing mail and using a computer to create fraudulent checks and false identification cards. Three different confidential sources "*ratted him off*" to the Vancouver, Washington, and the Portland, Oregon, Police Departments. Several of these sources also indicated that defendant and an associate of his possessed an SKS assault rifle and some "two part (binary) plastic explosives," as well as methamphetamine and heroin. Defendant was arrested. From jail, defendant called one of these sources (obviously not knowing that the source was working with the police) and asked him to move the explosives from his Vancouver residence to a particular apartment in Beaverton, Oregon. The resident at this apartment consented to it being searched, resulting in the recovery of two pounds of "Kinepak binary explosives." Using all this information, Vancouver police obtained a state search warrant for defendant's residence. Knowing these facts, and discovering that defendant had an outstanding arrest warrant for carrying a concealed firearm, the proposed execution of the warrant was considered to be "high risk." Therefore, the Southwest Regional SWAT team was called in to make the initial entry. The officers were equipped with helmets and raid uniforms, with "POLICE" written on them in reflective letters. In preparing to execute the warrant, it was noted that three or four people were inside. At about 8:00 p.m., just before the officers were ready to knock, one of the occupants suddenly opened the door. Noting the presence of the police on the front porch, this person quickly attempted to shut the door. The officers responded by yelling "*Police, with a search warrant*!", forced the door open, and made an immediate entry. Simultaneously, other officers broke windows, tossed in "stun grenades," and entered, quickly subduing the occupants. In the subsequent search, explosives, blasting caps, methamphetamine, tar heroin, over 1,000 pieces of stolen mail, mailbox keys, fake IDs, a laminator, a credit card imprinting machine, counterfeit and forged checks, and over $10,500 in cash, were all recovered. Charged in federal court, defendant's motion to suppress all this evidence as the product of a "*knock and notice*" violation was denied by the trial court. Defendant pled guilty, and appealed.

HELD: The Ninth Circuit Court of Appeal affirmed defendant's conviction. In so doing, the Court noted that police officers are not bound by constitutional knock and notice requirements when they "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be (1) dangerous or (2) futile, or that it would (3) inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This rule is based upon a United States Supreme Court decision; *Richards v. Wisconsin* (1997) 520 U.S. 385, which had a fact situation very similar to the instant case. With a subject who attempts to slam a door in the officers' faces, upon seeing clearly-identified police officers standing on the porch, the officers reasonably believed that any or all three of the above exceptions to the knock and notice requirements applied. Knowing there were explosives involved, and that defendant was known to have illegally possessed a concealed firearm, gave the officers reason to fear for their safety. To wait to be admitted after the door was slammed in their face would certainly be an idle act. And knowing that drugs were likely to be found inside, it could be expected under these circumstances that evidence would be destroyed while the officers stood at the front door. Therefore, the officers' failure to comply with knock and notice was reasonable.

NOTE: This really wasn't even a close case. When a suspect, seeing you coming, attempts to slam the door in your face, you are certainly reasonable in concluding that you are being denied admittance. The Court further noted that a police officer only needs to have only a "*reasonable suspicion*" to believe such an exigent circumstance exists to justify an immediate, forced entry. The decision was unclear, however, as to whether defendant was even present at the time of the execution of the warrant, mentioning at one point that he had been arrested prior to that time. If he was not present, then it should have also been an issue whether he even had "*standing*" to challenge the officers' method of entry. So far, the Ninth Circuit has held that an absent resident does *not* have standing in such a situation. (see *Mena v. City of Simi Valley* (9th Cir. 2000) 226 F.3rd 031, 1035, fn. 2.) Either defendant had bailed out by the time of this search, or the Government failed to raise the issue of defendant's lack of standing.

NOTES:

United States v. Bynum

(9th Cir. 2004) 362 F.3d 574

SUBJECT: Knock and Notice; Exigent Circumstances

RULE: Knowledge that a narcotics suspect has a tendency to answer the door while armed, at least when combined with other unusual behavior (e.g., answering the door in the nude), is sufficient "*reasonable suspicion*" to believe that compliance with the knock and notice requirements would be dangerous to the officers.

FACTS: A tested, reliable informant (CI) told North Las Vegas police officers that defendant was dealing crack cocaine from a particular apartment. Two controlled purchases were conducted at defendant's apartment within a two-week period, with the CI buying rock cocaine from defendant on one occasion and from an unidentified female on another. During the CI's buy from defendant himself, defendant was armed with a handgun, pulling it out from his pocket. Three weeks after the second purchase, an undercover officer went to defendant's apartment and knocked. Defendant answered the door wearing nothing but a pair of socks and carrying a "chambered semiautomatic pistol" at his side. Defendant agreed to sell the officer rock cocaine, returning to the door with the cocaine after putting on his undershorts and still carrying the pistol. Based upon this information, the officers obtained a search warrant authorizing nighttime service for defendant's residence. Due to defendant's propensity to answer the door while armed, and his bizarre behavior, the officers considered this to be a "*high-risk*" search warrant service. At about 10:00 p.m, seven hours after the last controlled buy, the officers surrounded the apartment, exploded two "Omniblast devices" (a device that makes a loud noise and creates a bright flash of light) outside its windows, and simultaneously crashed the front door with a battering-ram. Except to yell, "*Police*, *search warrant*!" as they entered, there was no attempt to comply with any knock and notice requirements. Within the next 10 to 15 seconds, while setting off two more Omniblast devices, the officers did a quick search of the apartment and found defendant (and his girlfriend) in the bedroom. A search of the apartment resulted in recovery of the semiautomatic pistol and a loaded semiautomatic shotgun. (No drugs were found.) After defendant's motion to suppress the guns was denied, he pled guilty in Federal Court to being a felon in possession of a firearm (18 U.S.C. §§ 922(g)(1), 924(a)(2)). He then appealed.

HELD: The Ninth Circuit Court of Appeal affirmed. Defendant's argument on appeal was that the failure to comply with the federal "*knock and announce*" requirements violated both the federal statute (18 U.S.C § 3109) and the Fourth Amendment, and that the guns should have been suppressed as a result. The Court, however, ruled that while knowledge of a gun on the premises, standing alone, does not excuse the failure to comply with the federal "*knock and announce*" requirements, "the presence of a firearm coupled with evidence that a suspect is willing and able to use the weapon will often justify noncompliance with the knock and announce requirements." In this case, knowing that defendant had a tendency to answer the door with gun-in-hand, plus his other unusual actions (answering the door in the nude), was sufficient to reasonably cause the officers to be concerned for their safety. The standard is only a "*reasonable suspicion*" to believe that defendant constitutes a danger. The Court further noted that having to do damage to the apartment (i.e., knocking the door off its hinges) does not require a higher degree of exigency. Also, the fact that the suspected evidence present in the apartment was drugs, which are easily disposable, adds to the justification for making an immediate entry. Lastly, because the exigency exceptions to the Fourth Amendment knock and notice rules are interpreted the same as they are for 18 U.S.C. § 3109, the entry was lawful under either.

NOTES:

Martin v. City of Oceanside

(9th Cir. 2004) 360 F.3d 1078

SUBJECT: Residential Entry (Emergency Aid Exception)

RULE: Where police have reliable information (approximating probable cause) a resident of a house may be in trouble and reasonably believe the residents should be at home but are not answering the door or phone, police may enter without a warrant to check on the resident's welfare.

FACTS: The Oceanside police received a call from a doctor in Oregon asking them to check on the safety of his daughter (Trotman) who lived in their jurisdiction. The doctor reported that he had been unable to reach her for several days and was extremely concerned about her welfare. The doctor believed she could be in trouble. The doctor provided the police with a description of his daughter's car and address. Later that day, police arrived at the residence where the daughter and a roommate (Martin) lived. An officer knocked and rang the doorbell, but no one answered. Unbeknownst to the officer, Martin and Trotman were inside. Martin had heard the officers knocking and recognized them as police as he peered through the peephole. However, instead of responding, Martin went upstairs to Trotman's bedroom and the two decided to secrete themselves under the mistaken (and unreasonable) impression that Martin's ex-wife had made a false accusation about him to the police. Meanwhile, the police, seeing that Trotman's car was parked in the driveway had headquarters call the house. Nobody answered. One of the officers then walked to the side of the house, located an unlocked door to the garage. The officer entered the garage and found an unlocked door leading inside to the house. The officer did not enter, fearing that a crime might have been in progress. The officer called for back-up. While waiting for the other officer to arrive, the first officer spoke with a neighbor. The neighbor said she had seen Trotman three days before and Martin the day before. She also said that since both of their cars were parked in the driveway, they should be home. After the second officer arrived, both officers entered the house through the garage with their flashlights on and guns drawn. The officers checked the downstairs, found no one, and then proceeded up the stairway to the second floor. When they got to the top of the stairs, Trotman met them. The officers asked her to identify herself and after a short argument about the officers not having a warrant, she produced identification. The officers confirmed that she was safe, and left the house shortly thereafter. Martin then sued the officers under 42 U.S.C. section 1983, claiming the officers had violated his Fourth Amendment rights by entering his home without a warrant and failing to knock and announce. The trial court dismissed the suit on the ground the entry was lawful under to the "emergency aid" exception to the Fourth Amendment and thus the officers were protected from civil liability by "qualified immunity."

HELD: The Ninth Circuit upheld the dismissal of the civil suit, finding the entry was justified under the "emergency aid exception" to the warrant requirement. This exception allows entry when officers reasonably believe someone inside is in need of immediate aid. The exception applies when three circumstances are present: (I)the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (ii) the search must not be primarily motivated by intent to arrest and seize evidence; and (iii) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. All three circumstances were present in the instant case. The Ninth Circuit also rejected the argument that the officers violated the "knock and notice" rule, finding that even if the officers failed to properly comply with all the knock and notice requirements before making entry (a fact not conceded), the purpose of the knock notice rule is not served where the occupants of the home know that it is the police knocking at the door and then secrete themselves instead of answering the door like a normal person.

NOTES:

People v. Morton

(2003) 114 Cal.App.4th 1039

SUBJECT: Community Caretaking Exception to the Search Warrant Requirement

RULE: The *Community Caretaking* exception to the Fourth Amendment search warrant requirement does *not* apply unless there is a *reasonable belief* that the occupants of a residence are in need of aid.

FACTS: Defendant and his wife (co-defendant) operated a commercial nursery in Santa Rosa, and lived on the property. A neighbor suspected that the two were cultivating marijuana on the property and reported his suspicions to the local Sheriff's Department. A visit by detectives, however, did nothing to substantiate the neighbor's accusations. A couple of weeks later the neighbor called again expressing a concern that something had happened the previous night, and that the defendants may have been the victims of a marijuana rip-off. The neighbor showed the detectives two marijuana leaves hanging on the chain link fence dividing their respective properties, a depression in the ground under the fence where someone may have crawled through (although it appeared from pictures to be too small for a person to fit), and a small amount of marijuana debris on the neighbor's adjacent driveway. Although the neighbor had not heard anything unusual during the night, he expressed concern for the defendants' welfare, noting that he had not seen them that day when they would normally be out and about playing loud music. Based upon this, the detectives claimed to be concerned that something had in fact happened at the nursery the night before. They therefore decided to make contact, telling their dispatcher that they were going to conduct a *Knock and talk*. However, the nursery was closed that day with the front gate closed and locked. The detectives therefore climbed over the gate and knocked at the front door. Although people could be seen moving around inside, no one came to the door. Eventually, defendant peeked out through a window but still did not open the door. When he finally came out onto the porch, a heavy odor of marijuana followed him. Pieces of marijuana debris were visible on the defendant's clothing. A nervous defendant refused to summon the other occupants of the house. The detectives' knock and notice announcement was ignored, so they opened the front door and observed marijuana being processed inside. A search warrant was obtained based upon this information and evidence was recovered. Charged in state court with cultivating marijuana and possessing marijuana for purposes of sale, the defendants' motion to suppress the evidence was denied. The trial court based its decision on the detectives' stated concern that the defendants may have been the victim of a drug rip-off, and that the warrantees entry onto the property was therefore justified under law enforcement's so-called *community caretaking* function. Defendants' pled guilty and appealed.

HELD: The First District Court of Appeal (Div. 3) reversed, finding the entry onto the defendants' property to be illegal, thus invalidating the resulting search warrant. As a general rule, the non-consensual entry onto property where its occupants have a *reasonable expectation of privacy*, such as in a fenced-off and locked yard, requires a search warrant. One of the recognized exceptions to the search warrant requirement is under the so-called *community caretaking* function of law enforcement. Under this theory, a law enforcement officer may enter into a constitutionally protected area when necessary to come to the aid someone on the property or to protect the victim's property. This theory *does not* apply when the officers are acting to solve crime; such an entry requiring *probable cause*. Entering a protected area under the *community caretaking* theory requires only that the officers *act reasonably*; i.e., with a reasonable belief that the occupant needs assistance. In this case, the sparse facts known to the detectives did not support a conclusion that the defendants were victims of any crime or otherwise in need of law enforcement's assistance. Also, it did not appear that the detectives were truly motivated by any concern for the welfare of the defendants. The detectives' suspicion that the defendants might be engaged in cultivating marijuana appeared to be their

primary motivation. As such, the *community caretaking* exception to the Fourth Amendment search warrant requirement did not apply in this case. Also, there was insufficient probable cause, and no exigent circumstances, to allow for a warrantees entry into the defendants' yard to investigate crime.

NOTE: While there may have been *some* cause to believe that the defendants might have been the victims of a drug rip-off, the detectives really had very little to substantiate this conclusion. They really had little more than an *unparticularized hunch*, as noted by the Court, that the defendants might have been victims of a crime and needed help. And, based upon the detectives' words and actions, they really weren't too concerned with the defendants being victims. They were very obviously more interested in whether defendants were cultivating marijuana; a belief that was primarily based upon the unsubstantiated suspicions of the defendants' neighbor. A little marijuana debris at the edge of the defendants' property is hardly enough. But even so, the attempt to conduct a *Knock and talk* would have been okay except for the locked gate protecting the residence. Lacking the legal authority, therefore, to climb over that locked gate, the detectives would have been well advised to show a little more patience and do a more thorough investigation first. Had they done that, this case could have been saved.

NOTES:

United States v. Brooks

(9th Cir. 2004) 367 F.3d 1128

SUBJECT: Warrantees Searches of Motel Rooms

RULE: With reasonable cause to believe a victim of domestic violence is in need of assistance, a warrantees entry into a motel room is legally justified.

FACTS: Defendant and his "*significant other*" of three weeks, staying together in a room at the Extended Stay America Hotel in Lake Forest, California, had an argument that was loud enough to cause neighbors in the adjoining rooms to call the Sheriff's Department. Deputy Sheriff Marcus Perez responded and talked to one of the neighbors who told him that it sounded like a woman was being beaten. Perez contacted defendant at the door to his room and told him why he was there. Defendant admitted to having had an argument with his girlfriend. Perez could see that the room was in "total disarray." After Perez asked to talk to the girlfriend, defendant walked to the bathroom door to ask her to come out. As he did so, the deputy followed, stepping inside the room. At this point the deputy could hear a female in the bathroom crying. When the still-emotional girlfriend finally emerged from the bathroom, she appeared to be undamaged, denying that she was hurt or that she had been assaulted. The girlfriend provided Perez with some identification when asked. Defendant denied having any and gave a name later determined to be false. When Perez asked if they had anything illegal in the room (Perez later testifying that he meant "weapons"), defendant said that there was some marijuana in a dresser. Perez asked for permission to search for marijuana and both subjects consented. On the dresser was a man's wallet. Perez looked into the wallet and found defendant's driver's license. Defendant told Perez at this time that he was a parolee-at-large, wanted in Oregon, and on parole for bank robbery. An active warrant was in fact outstanding for his arrest. Upon being handcuffed, Perez remembered a prior bank robbery from which defendant appeared similar to the suspect description. Perez therefore continued to search the room and found some $3,000 hidden in a tennis racket case which, when questioned, defendant admitted was his. Later charged in federal court with three counts of bank robbery, the trial court suppressed the defendant's statements made after that point in time when he was formally arrested, there having been no *Miranda* admonishment. Defendant's motion to suppress the physical evidence found in the room, however, was denied.

HELD: The Ninth Circuit Court of Appeal affirmed. Discussing the defendant's contentions, one by one, the Court first determined that probable cause and exigent circumstances supported the deputy's right to make entry into the motel room. Noting the potential dangerousness of domestic violence situations, Deputy Perez was reasonable in concluding that the female he knew to be in the bathroom might need his assistance. With a neighbor who the deputy personally interviewed (and was thus able to assess her credibility) reporting that it sounded like a female was being beaten, defendant's admission at the door that they had been fighting, and the room in visible disarray, entering the room was reasonable. It is not constitutionally required that the deputy take the less intrusive action of waiting for the girlfriend to come out into the hallway. Next, the Court determined that the deputy was not required to end his inquiry merely because the girlfriend denied being physically abused. In the deputy's (and the court's) experience, it is not uncommon for domestic violence victims to deny injury, particularly with the alleged abuser there in the room. Lastly, the Court ruled that it was reasonable for the deputy to ask about anything illegal being in the room, and to ask for a consent to search when defendant admitted to having marijuana. Looking into defendant's wallet and continuing the warrantees search of the rest of the hotel room was not challenged by the defendant, so was not discussed by the Court.

NOTE: This is another example of never knowing which way the Ninth Circuit Court of Appeal is going to go on any particular issue. There are other justices on the Ninth Circuit panel who are notorious for faulting such

inquisitiveness and perseverance as displayed by Deputy Perez in this case. As to the deputy's actions, some prosecutors have to wonder whether he wasn't just blindly barreling forward, fueled by little more than gut instinct. For instance, had he been thinking about what he was doing, a *Miranda* admonishment after the cuffs went on and the questioning continued would have been a good idea. And then, upon deciding that defendant looked like the suspect in a recent bank robbery (a conclusion that apparently turned out to be correct), and his admission that he was a convicted bank robber and parolee-at-large, it might have been a better idea to stop and get a search warrant. Too many law enforcement officers are of the mistaken belief that once you arrest someone in a residence (which includes a motel room), the entire place is automatically subject to a warrantees search. Here, we had the prior consent to fall back on. But it always makes for a lot cleaner case to stop and get a search warrant when you stumble into something bigger than you realized you had when you started the search. Some other three-judge panel of the Ninth Circuit might not have been so lenient.

NOTES:

People v. Celis

(2004) 33 Cal.4th 667

SUBJECT: Detentions: Use of Firearms and Handcuffs: Protective Sweeps Based Upon a Detention Outside the Home

RULE: (1) The use of firearms and handcuffs, when necessary under the circumstances, does not necessarily convert a detention into an arrest.
(2) A protective sweep of a residence requires at least a reasonable suspicion that there is someone inside who constitutes a danger.

FACTS: Orange County police developed probable cause to believe drugs and money were being smuggled in large tires. A search warrant executed at a Los Angeles County residence resulted in recovery of $400,000 cash and a tire that had been cut open. Another cut-open tire was later found in a search at another Los Angeles County address. Intelligence information led officers to a residence in San Diego. Through surveillance at this address, officers traced the license number of a vehicle at the scene to another San Diego residence on "A" Street, defendant's residence. While watching the "A" Street residence, defendant was seen leaving the house and driving to a tire store where he picked up an air pressure tank. Defendant then drove to the border and walked into Mexico where surveilling officers lost him. The next day, defendant was observed driving around San Diego with his wife, engaging in "evasive driving" as if he knew he was being followed. Later, defendant was observed driving back to the tire store where he picked up a deflated tire that was too big for his vehicle. Defendant later returned to the tire store yet again, this time in the company of another man, Ordaz. They were observed taking an air pressurizing tank into the store and then returning with it to the "A" street address. Forty minutes later, defendant was seen coming out the back door of the "A" Street house rolling an inflated truck tire toward the alley toward a truck driven by Ordaz. Believing that the tire might contain drugs or money, officers stopped defendant and Ordaz at gun point, handcuffed them, and ordered them to sit on the ground. Knowing that the defendant had a wife and son who might be in the house, the officers entered to conduct a "protective sweep." While engaging in this two-minute sweep, a large open box, big enough to hold a person, was observed in the kitchen. Several bricks of cocaine were found in the box. After defendant later consented to a search of his house, 16 kilograms of cocaine were found in the box and another 25 kilograms were found in the tire. Defendant's motion to suppress the evidence was denied by the trial court, and the ruling was affirmed by the court of appeal. The California Supreme Court granted defendant's petition for review.

HELD: The California Supreme Court reversed. (1) The court first rejected defendant's argument that he had been arrested in the alley without probable cause. Whether a suspect is under arrest or merely being detained is an objective test, based upon the circumstances. Despite the use of firearms, handcuffs, and making the suspect sit on the ground, the contact was still only a detention because the officers "diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances." The brevity of the invasion of defendant's Fourth Amendment interests is a factor to consider. Here, defendant was only held in such a manner for less than two minutes as a protective sweep was conducted of his home. The fact that the officers were confronted with two persons who were suspected of committing a felony warranted the use of guns and handcuffs. Under these circumstances, defendant was only detained. (2) However, the court agreed with defendant's second argument; i.e., that the officers conducted a protective sweep of his house without reasonable suspicion to believe that there was someone inside who constituted a danger to the officers. The general rule is that to conduct a protective sweep of a residence (at least beyond the

immediately-adjacent rooms) following an arrest within the house, the officers must have reasonable suspicion to believe there is someone there who constitutes a danger to the officers. (See *Maryland v. Buie* (1990) 494 U.S. 325.) Whether or not the same rule applies when the suspect is merely being detained, and/or when that detention occurs outside the house, are issues the court declined to decide because the officers did not have reasonable suspicion to believe anyone inside constituted a danger to them. Merely knowing that defendant has a wife and son who lived with him is not sufficient cause to believe that they were either a danger or even home at the time. Therefore, the entry of defendant's house, and the resulting observations, were illegal. The evidence should have been suppressed.

NOTE: The rules on protective sweeps is probably one of the more commonly misunderstood search and seizure issues, mainly because any officer who decides *not* to do one merely due to a lack of information about whether someone may be in a house who might be a threat to the officer is taking a real gamble. Recognizing this, protective sweeps are commonly done as a matter of routine; often illegally. But the rule has always been that they are illegal, at least when searching beyond any immediately-adjacent rooms, absent reasonable suspicion to believe there is someone there who is a threat to the officer's safety. Accordingly, the evidence is suppressed. Also, the court raised a couple other issues here, and then declined to answer them. First, do the same rules apply when a person is only being detained as opposed to being arrested? Secondly, does it matter that the suspect is detained outside as opposed to inside the house? And where the suspect is detained outside, is reasonable suspicion sufficient to justify an entry into the house to do a protective sweep, or do we need full blown probable cause? Stay tuned. These issues will no doubt be the subject of future cases.

NOTES:

People v. Carbajal

(2003) 114 Cal.App.4th 978

SUBJECT: Indecent Exposure, per P.C. § 314.1

RULE: Although a subject's genitals must be exposed to constitute a violation of P.C. § 314.1 (Indecent Exposure), it is not required that anyone actually see them. "*Exposure*" may be proved circumstantially.

FACTS: On two separate occasions, defendant ordered and ate a meal at a Mexican restaurant, sitting alone at a table. On the first occasion, after defendant finished his meal, the cashier observed him put his hand into his shorts and move his hand in an up-and-down motion for about 5 to 10 minutes. The cashier did not see defendant's genitals. Three weeks later, defendant returned, ate his meal, and then engaged in similar conduct. This time, however, although never actually seeing defendant's penis, the cashier could see his fist outside of his shorts, in the area of his crotch, as he made "strong movements" consistent with masturbating. When done, defendant appeared to ejaculate onto the floor beneath the table, leaving a puddle the cashier later recognized as semen. (The responding police officer, politely, I'm sure, declined to take a sample as evidence.) After wiping his hands with a napkin and throwing a newspaper on top of the puddle he deposited under the table, defendant left. Defendant was arrested and charged with two counts of indecent exposure, per P.C. § 314.1. After the prosecution rested, the trial court dismissed the count relating to the first incident, but denying the defendant's motion to dismiss Count Two. In his defense, defendant offered the testimony of his girlfriend to the effect that he merely had a rash on his testicles that required an occasional scratch, and that defendant would treat the rash with a thick lotion that had a consistency similar to semen. The jury didn't buy it, and convicted defendant of indecent exposure. Defendant appealed, arguing that because no one had ever actually seen his penis, the elements of P.C. § 314.1 had not been satisfied.

HELD: The Fourth District Court of Appeal (Div. 3) affirmed defendant's conviction. The issue here is whether a defendant's exposed genitals have to be seen by a witness in order to constitute a violation of P.C. § 314.1. The section requires that a person "willfully and lewdly . . . "[e]pose . . . his [or her] person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . ." A prior decision (*People v. Massicot* (2002) 97 Cal.App.4th 920) has held that a defendant's genitals must actually be exposed to view to be a violation of P.C. § 314.1. But there is no authority for the argument that anyone must actually see a suspect's genitals, so long as it can be proved that they were exposed to view in a public place or anywhere other persons are present who may be offended or annoyed. In interpreting the elements of section 314.1, the Appellate Court here reviewed the history of indecent exposure statutes from the Common Law to the present day, both in California and in other states. Consistently, with rare exception, it has been held that although the genitals must actually be exposed, there is no requirement that anyone see them. The fact of exposure may be proved circumstantially. In this case, the cashier could see defendant's fist making a masturbation-like motion in the area of his crotch, outside of his pants, after which a substance that appeared to be semen was found at that location under the table. A reasonable jury could certainly find, based upon this evidence, that defendant had indeed exposed his penis with a lewd intent. Defendant, therefore, was properly convicted.

NOTE: It is important to note the legal significance of this decision and its value in limiting the findings of *People v. Massicot*. *Massicot* left many of us a bit confused as to what it takes to constitute indecent exposure. *Massicot* involved another defendant purposely dancing around in front of a female victim in woman's underwear, exposing just about all of his body *except* for his "*private parts*." The Court in *Massicot* held that no matter how lewd or sick such activity might be, it was not enough to meet the requirements of

P.C. §314.1. A suspect's private parts must actually be exposed. The Court in this new case did not disagree with *Massicot*. It merely found that such exposure may be proved *circumstantially*. The suspect's genitals, or other "private parts," do not actually have to have been seen by anyone. *However*, remember that we still have to prove *beyond a reasonable doubt* that the defendant did in fact expose his genitals. The problem with circumstantial evidence is that there is often some other reasonable, innocent, interpretation. Just as in Count 1 of this case, which the trial court dismissed, the prosecution could not prove that the defendant had in fact taken his penis out of his pants based upon what little the waitress had seen. So if you expect your 314.1 case to get issued, be ready to convince your prosecutor how we are going to be able to disprove, beyond a reasonable doubt, a defendant's claim that he never really pulled his privates out of his pants.

NOTES: